

THE
INDIAN TRUSTEES ACT, 1866.

(ACT XXVII OF 1866).

(WITH THE CASE-LAW THEREON)

BY

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NAMES OF CASES NOTED IN THIS ACT.

English Cases.

	PAGE
Attorney General of Ontario v. Mercir, 8 A C 767 ...	8
Dashwood v. Ayles, 16 Q B D 295 ...	5
Ford v. Tynte, 2 J and H 150 ...	6
Joc v. Andley, 1 Cox 324 ...	13
Morgan v. Abergavenny, 8 C B 768 ...	6
Salkeld v. Johnson, 5 Q B 313 ...	1
Sill v. Worswick, 1 H Bl 690 ...	5
Tarquand v. Board of Trade, 11 A C 286 ...	1
Taylor v. Corporation, L R 4 C L D 395 ...	1
Thistleton v. Frewer, 31 L J Ex 230 ...	1
Tomkins v. Jones, 22 Q B D 599 ...	5
Yorkshire Fire and Life Insurance Co. v. Clayton, 82 B D 421 ...	5

Indian Cases.

I. L. R. Allahabad Series

Uda Begum v. Imamuddin, 2 A 74 ...	2
Queen-Empress v. Indarjit, 11 A 262 ...	1, 2
Kadir Bakhsh v. Bhawan Prasad, 14 A 145 ...	2

I. L. R. Bombay Series.

Kahandas Narrandas <i>In the matter of the petition of</i> , 5 B 154 ...	16, 17
Waghela Rajsanji v. Shekh Masludin, 11 B 551 ...	1
Farington v. Dart, 21 B 9 ...	12

I. L. R. Calcutta Series.

Daimoddee Paik v. Kaen Faridar, 5 C 300 ...	2
Lackersteen v. Rostan, 7 C 32 ...	23
Alangamonjori Dabce v. Sonamoni Dabce, 8 C 637 ...	2

Bombay Law Reporter.

Balshet v. Dhondo, 3 Bom L R 548 ...	1
Narandas v. Parshotam, 4 Bom L R 550 ...	1

Calcutta Weekly Notes.

Fulchand and Soboranchand v. Musst. Kismesh Koer, 4 C W N ccxvi ...	1
---------------------------------------------------------------------	---

Madras High Court Reports.

Chinna Aiyan v. Mahomed Fakrudin Saib, 2 M H C R 322 ...	1
----------------------------------------------------------	---

N. W. P. High Court Reports.

James Powell Junior <i>In the goods of</i> , 6 N W P 54 (56) ...	29
------------------------------------------------------------------	----

THE INDIAN TRUSTEES ACT, 1866.

C O N T E N T S.

PREAMBLE.

SECTIONS.

1. [*Repealed.*]
2. Interpretation-clause.
3. High Court to have jurisdiction in what cases
4. High Court may convey estates of lunatic Trustees and Mortgagees ;
5. and may convey contingent rights
6. High Court may transfer stock or Government securities of lunatic Trustees and Mortgagees.
7. Power to transfer stock or Government securities of deceased persons.
8. High Court may convey estates of minor Trustees and Mortgagees.
9. Contingent rights of minor Trustees and Mortgagees.
10. High Court may convey estate of Trustee out of jurisdiction of Court.
11. High Court may make order where persons hold immoveable property in trust jointly with persons out of jurisdiction.
12. Contingent rights of Trustees
13. High Court may make order where persons jointly entitled with others out of jurisdiction to contingent right in immoveable property.
14. When uncertain which of several Trustees survived.
15. When uncertain whether last Trustee living or dead.
16. When Trustee dies without heir.
17. Contingent right of unborn Trustee.
18. Power to make order for vesting estate on refusal or neglect of Trustee to convey or release.
19. Power to convey in place of Mortgagee.
20. Power to appoint person to convey in certain cases.
21. When Trustees of stock or Government securities joined with Trustees out of jurisdiction.
22. When Trustee of stock, etc., refuses to transfer.
23. When one of several Trustees of stock, etc., refuses to transfer or receive and pay over dividends.
24. When stock, etc., standing in name of deceased person.

SECTIONS.

25. Effect of order vesting legal right to transfer stock, etc.
Obligation to comply with requisitions of person invested.
Indemnity.
Termination of powers of person replaced.
26. Effect of order vesting legal right in thing in action.
27. On neglect to transfer stock, etc., for twenty-eight days, order made vesting right to transfer in such person as Court appoints.
28. Similar order on like neglect by executor.
29. Legal right to transfer stock to vest in person appointed by High Court.
Powers of person appointed.
Obligation to comply with his requisitions.
30. Power to make order for transfer or receipt of dividends of stock, etc., in name of minor Trustee.
31. When decree made for sale of immoveable property for payment of debts.
32. Holding immoveable property the sale of which has been ordered by High Court.
Order for vesting estate in lieu of conveyance by party to suit in order to carry out sale.
Effect of order.
33. Court to declare what parties are Trustees of immoveable property comprised in suit, and as to interests of persons unborn.
34. Power to direct how right to transfer stock shall be exercised.
35. Power to Court to make order appointing new Trustees.
Power of new Trustees.
36. Power to Court to vest immoveable property in new Trustee.
37. Power to Court to vest right to sue in new Trustees.
38. Old Trustees not discharged from liability.
39. Who may apply.
40. Application may be by petition.
41. What may be done upon petition.
42. Court may dismiss petition with or without costs.
43. Power to make order in cause.
44. Orders by High Court founded on certain allegations conclusive evidence of matter contained therein.
Powers as to re-conveyance of immoveable property, etc.
45. Trustee of charity.
46. Money of minors and persons of unsound mind to be paid into Court.
47. Court may make decree in absence of Trustee.
Decree not effective without service of process.
48. Orders under Act chargeable with same stamp-duty as deeds of conveyance.
49. Costs may be paid out of estate.
50. Enquiry concerning person of unsound mind.

SECTIONS.

- Effect of order.
 - Postponement of order pending enquiry.
 - 51. Suit may be directed.
 - 52. Indemnity to persons obeying orders under Act.
 - 53. Execution and effect of orders.
 - 54. Short title.
 - 55. [*Repealed.*] .
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THE INDIAN TRUSTEE ACT, 1866.

(ACT XXVII OF 1866).

RECEIVED THE G. G.'S ASSENT ON THE 24TH OCTOBER 1866.

An Act to consolidate and amend the law relating to the conveyance and transfer of property in British India vested in Mortgagees and Trustees, in cases to which English Law is applicable.

WHEREAS it is expedient to consolidate and amend the laws relating to the conveyance and transfer of moveable and immoveable property in British India vested in mortgagees and trustees, in cases to which English law is applicable, It is hereby enacted as follows:—

(Notes).

1.—“ Preamble.”

(1) Preamble of an act—Importance.

The preamble of an act is usually of great importance in construing the extent of the operation of the law and should be read with its sections. 4 C.W.N. cxxvi. **A**

(2) Preamble—Nature of.

- (a) It is the introduction to the Act, “a key to open the meaning of the makers of the Act and the mischiefs it was intended to remedy,” *Targuand v. Board of Trade*, 11 A.C. 286. **B**
- (b) It lays down the limitations and restrictions subject to which the enactment is passed, it being always permissible to refer to it for the purpose of keeping the effect of the Act within its real scope as it usually states and professes to state the intention of the Legislature in passing the enactment. (*Ibid.*) **C**
- (c) But, unless there be something which is inconsistent with the spirit of the Act, it cannot be said that the preamble has cut down its express provisions. *Thistleton v. Frewer*, 31 L.J. Ex. 230; 9 Bom. L.R. 548. **D**

(3) Preamble—Use of.

- (a) Where the language of the sections of a statute is clear, the terms of a preamble cannot be resorted to to restrict their operation or to cut them down. *Salkeld v. Johnson*, 5 Q.B. 313; 2 M.H.C.R. 322. **E**
- (b) The preamble should be referred to to ascertain the intention of an Act when the enacting part of the Act is ambiguous, although it is not conclusive as a statement of extrinsic fact. *Ibid.*; 4 Bom. L.R. 550 following 11 A. 262; 9 Bom. H.C.R. 205 (215); 11 B. 551. **F**

(4) Preamble—Object of.

The purpose for which a preamble is framed to a statute is to indicate what in general terms was the object of the Legislature in passing the Act. *Taylor v. Corporation*, L.R. 4 Ch. D. 395. **G**

1—"Preamble"—(Concluded).

(5) Preamble—Effect of.

The effect of a preamble to an Act, must be understood to overlie the whole Act giving color to and controlling its provisions, and by showing the intention of the Legislature supplying *pro tanto* the rule for their interpretation. (*Ibid.*); 11 A. 262. H

(6) Marginal notes—Nature and use of.

The preamble is a necessary part of the Act, while the marginal notes are not. The latter should not be looked into for the purpose of construing the sections of the Act. 2 A. 74 ; 5 C. 300 ; 8 C. 637 ; 14 A. 145. I

1. [Repealed by Act XIV of 1870.]

Interpretation clause. 2. In this Act, unless there be something repugnant in the subject or context,—

"Immoveable property" ¹ shall extend to and include messuages, tenements ², and hereditaments ³, corporeal ⁴ and incorporeal ⁵, of every tenure ⁶ or description, whatever may be the estate or interest ⁷ therein :

"Stock" shall mean any fund, annuity ⁸ or security transferable in books kept by any Company or Society established or to be established, or transferable by deed ⁹ alone, or by deed accompanied by other formalities ¹⁰, and any share or interest therein. It shall also include shares in ships registered under the Merchant Shipping Act, 1854, or at any port in British India :

"Hold" and "Holding" shall be applicable to any vested estate ¹¹, whether for life ¹² or of a greater or less description ¹³, in possession ¹⁴, futurity, or expectancy in any immoveable property ¹⁵.

"Contingent right," as applied to immoveable property ¹⁶, shall mean a contingent or executory interest ¹⁷, or possibility coupled with an interest whether the object of the gift or limitation of such interest or possibility be or be not ascertained ¹⁸ ; also a right of entry, whether immediate or future, and whether vested or contingent ¹⁹ :

"Convey" and "Conveyance," applied to any person, shall mean the execution by such person of every necessary or suitable assurance for conveying or disposing to another immoveable property which such person holds, or in which he is entitled to a contingent right, either for the whole estate of the person conveying or disposing, or for any less estate, together with the performance of all formalities required by law to the validity of such conveyance ²⁰, including the acts to be performed by married women and tenants-in-tail ²¹ in accordance with the provisions of Act XXXI, of 1854 ²² (*to simplify the modes of conveying land in cases to which the English law is applicable*) :

"Transfer" shall mean the execution and performance of every deed and act by which a person entitled to stock or Government securities can transfer such stock or Government securities from himself to another :

"High Court" shall mean every Court now or hereafter established under the Statute 24 and 25 Vic., cap. 104, and also the Chief Court of the Panjab, or such one or more Judges of the said Courts respectively as shall be appointed by the Chief Justice or the senior Judge, as the case may be, to entertain applications and make orders under this Act :

"Trust" shall not mean the duties incident to an estate conveyed by way of mortgage, but, with this exception, the words "Trust" and "Trustee" shall extend to and include implied and constructive trusts ²³, and shall extend to and include cases where the trustee has some beneficial estate or interest in the subject of the trust, and shall extend to and include the duties incident to the office of executor or administrator of a deceased person :

"Lunatic" shall mean any person who shall have been found by due course of law to be of unsound mind and incapable of managing his affairs :

"Person of unsound mind" shall mean any person not a minor who, not having been found to be a lunatic, shall be incapable from infirmity of mind to manage his own affairs :

In the case of a will made or an intestacy occurring before the first day of January 1866, "Heir" shall mean the person claiming an interest in the immoveable property of a deceased person ²⁴ under the laws concerning descent applicable to such property : and "Devisee" shall, in addition to its ordinary signification, mean the heir of a devisee and the devisee of an heir, and generally any person claiming an interest in the immoveable property of a deceased person, not as heir of such deceased person, but by a title dependent solely upon the operation of the laws concerning devise and descent ²⁵ :

In the case of a will made or an intestacy occurring on or after the first day of January 1866 "Heir" shall mean any person claiming an interest in the immoveable property of a deceased person under the rules for the distribution of an intestate's estate, and "Devisee" shall mean any person taking immoveable property under a bequest, and any person, other than an executor or administrator, claiming an interest in immoveable property, not as entitled thereto under the said rules, but by a title dependent solely upon the operation of the laws concerning intestate and testamentary succession :

"Mortgage" shall be applicable to every estate or interest in immoveable or moveable property which would in the High Court be deemed merely a security for money ²⁶ :

"Person" shall include any company or association, or body of persons whether incorporated or not:

Words importing the singular number only shall extend to several persons or things; words importing the plural number shall apply to one person or thing; words importing the masculine gender shall extend to a female.

(Notes).

1.—"Immoveable property."

(1) Definition of the expression.

(a) Immoveable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth. General Clauses Act, S. 3 (Act X of 1897). J

(b) Immoveables are tangible things which cannot be moved, such as are lands and houses, whatever may be the interest or estate which a person has in them. Hence the term includes what English lawyers call "chattels real" that is to say, land, etc., in which a person has less than a freehold interest, as, for instance leaseholds. Dicey, p. 71. K

(2) Scope of the expressions "Immoveables" and moveables.

Immoveable property includes all rights over things, which cannot be moved, whatever may be the nature of such rights or interests. Moveable property includes both rights over moveable things, or goods, and rights which are not rights over a definite thing, but are claims by one person against another. Shortly stated, under English Law, immoveable property is equivalent to "realty" with the addition of "chattels real." Moveable property is equivalent to "personalty" with the omission of "chattels real." Dicey, p. 72. L

(3) Analogous expression in English Law.

The term immoveable property does not occur in the English Law where such property is designated real property as distinguished from moveable or personal property. Gour's Transfer of Property Act, Vol. I, p. 35 (1904). M

(4) Property—Meaning of.

Property is an ambiguous term; for it may denote either the things which are the objects of rights or ownership, or the rights over or ownership of such objects. Goodeve's Real Property, p. 5 (1906) 5th Ed. N

(5) Moveable and immoveable property—Distinction between—English Law.

(a) The main distinction between moveable and immoveable property is, that, as to the latter, the rules of devolution on the death of the owner follow the *lex situs* or *lex loci rei sitae* (i.e.), the law of the place where the immoveable property is situate; while, as to the former they are ascertained by the law of the domicile of the owner, or (as it is said) *Mobilia Sequantur personam*. Goodeve R. P. p. 17 (1906). O

1.—“*Immoveable property*”—(Concluded).

- (b) It is a proposition of law that “personal property has no locality.” The meaning is, not that personal property has no visible locality but that it is subject to that law which governs the person of the owner. With respect to the disposition of it, with respect to the transmission of it, either by succession or by the act of the party it follows the law of the person. The owner in any country may dispose of his personal property. If he dies, it is not the law of the country in which the property is, but the law of the country of which he was a subject, that will regulate the succession. For instance, if a foreigner having property in the funds in England, dies, that property is claimed according to the right of representation given by the law of his own country. *Stilt v. Worwick*, 1 H. Bl. 690; See Westlake’s Private International Law, Ch. V. P

2.—“*Tenement*.”

(1) Meaning of the word—English Law.

- (a) The word “tenement” in its strict legal signification is something which may be holden, that is, which may be the subject of tenure. Goode’s Real Property, p. 11 (1906) 5th Ed. Q
- (b) But popularly, it is often applied to designate houses or other buildings. (*Ibid.*) R
- (c) Thus, under the English Law, in a deed, a house is commonly described as “all that messuage or tenement.” 2 Dav. Prec. 11, 237. S
- (d) In Acts of Parliament, the word “tenement” is sometimes used to mean a house. *Yorkshire Fire and Life Insurance Co. v. Clayton*, 8 Q.B.D. 421; *Dashwood v. Ayles*, 16 Q.B.D. 295. T

(2) Use of the word tenement in “assurance.”

The word “tenement,” when used in an “assurance” may pass not only the land itself, but certain interests arising therefrom, as for example—

- (i) rents arising out of land,
- (ii) a right of common of pasture, that is, a right to turn out cattle to pasture on the land of another,
- (iii) a right of “turbary,” that is, a right to take, from another’s soil, turf fit for burning. Co. Litt. 6 a, 19 b, Challis, R.P. 43. U

3.—“*Hereditament*.”

(1) Meaning of the word—English Law.

- (a) The word hereditament “is the largest word of all in that kind,” for, whatsoever may be inherited is a hereditament, be it corporeal or incorporeal, real or personal, or mixed. Co. Litt. 6 a. Y
- (b) The word “hereditament,” when used in relation to land, sometimes denotes the land itself as a physical object, and sometimes the estate in the land. Challis, R. P. 44. W
- (c) But in *Tomkins v. Jones*, 22 Q.B.D. 599, it was observed by Bowen L. J., that the word is not used as describing the *quantum* of interest in the subject-matter, but as describing the subject-matter itself, namely, the land. X

3.—“*Hereditament*”—(Concluded).

(2) Chattels annexed to land are included in hereditaments.

(a) By the Common Law or by special local custom, among hereditaments, the English Law recognises some chattels which are considered as annexed to the inheritance and devolving with it. Goodeve's Real Property, p. 11 (1906). Y

(b) The owner of chattels of this nature cannot separate them from the inheritance by will, though it is possible for him to sell or dispose of them during his life-time. Co. Litt. 185 b. Z

(3) Chattels annexed to land—Examples.

(a) Deer in a lawful park unless they have been reclaimed. The case of Swans, 7 Rep. at 17 b. *Morgan v. Abergavenny*, 8 C.B. 768; *Ford v. Tynte*, 2 J. and H. 150. A

(b) Fish in a pond, rabbits in a warren, doves in a dovecot, muniments of title of an estate of inheritance. See the cases collected 33 Sol. J. 655. B

(c) The chest or box containing the muniments of title. Godolphin, Pt. II, C. 14, S. 1. C

N.B.—All these pass to the heir with the land at Common Law. Goodeve's Real Property p. 11 (1906).

(d) “*Heirlooms*”—Such as pictures, plate, or furniture, the enjoyment whereof is annexed to mansion or land, so as to devolve with the inheritance. Co. Litt. 18 b. D

N.B.—These devolve to the heir with the inheritance by special local custom.

4.—“*Corporeal*.”

(1) Corporeal hereditament—meaning of.

(a) Corporeal hereditaments are such as affect the senses, and may be seen and handled by the body, as land, houses and so forth. Challis, R.P.(47). E

(b) (i) Corporeal hereditaments are fixed as to their definition by the legal maxim that at Common Law (*i. e.*, apart from the Act 8 and 9 Vic. C. 106, S. 2) they lie in “*livery*” and not in grant. Challis R.P. 47. F

(ii) The phrase, therefore, includes only lands regarded as a physical object, and legal estates of inheritance in possession. (*Ibid.*) G

(2) Corporeal hereditaments, how conveyed.

The only conveyance in pais (*i. e.*, between party and party) by which these could, at Common Law, be conveyed to a stranger, was a “*Feoffment*” and the essence of a “*feoffment*” is the “*livery of the seisin*.” Challis R.P. 47. H

5.—“*Incorporeal*.”

(1) Meaning of the word.

The words “*incorporeal hereditament*” apply to such as are not the objects of sensation, can neither be seen nor handled. They are “*creatures of the mind and exist only in contemplation*.” Challis R.P. 47. I

5.—“*Incorporeal*”—(Concluded).(2) *Incorporeal hereditaments—Examples.*

- (a) A *rent* or annuity payable out of land. a right of fishing in a particular stream, or the benefit of the flow of a particular stream: a right of way or common: easements in respect of light and air. *Challis R.P.* 47. J
- (b) (i) The benefit of a condition annexed to an estate which devolves upon the heir. *Winchesters' case* 3 Rep. 2 b. See *Challis R.P.* 175, 192. K
- (ii) For legal purposes a “condition” is defined to be “a qualification or restriction annexed to a conveyance of lands, whereby it is provided that, in case a particular event does or does not happen, or in case the grantor or grantee does or omits to do, a particular act, an estate shall commence, be enlarged, or defeated.” 2 *Cruise Dig.* 2; *Co. Litt.* 201 a. L
- (c) (i) “Choses in action.” See *Goode’s R.P.* 14 (1906). M
- (ii) A “chose in action” may be described as a right of action to recover money or to enforce some legal obligation. The most common instance of a “chose in action” is a right to recover money in respect of a debt. (*Ibid.*) Cf. the definition of the expression “Actionable claim” in S. 3 of Transfer of Property Act. N

(3) *Incorporeal hereditaments, how conveyed.*

At Common Law—are said to “lie in grant,” because they would pass by the mere delivery of a deed purporting to convey them and the word “grant” was the most appropriate word of conveyance for the purpose. *Co. Litt.* 9 a. 3 *Cruise Dig.* 1, *Williams R.P.* pp 4, 30. O

(4) *Classification of hereditaments into corporeal and incorporeal under English law—Criticism of Austin.*

- (a) The classification is based on a confusion between rights and things which are the subjects of rights. *Austin’s Jurisp.* 371, 708, 804 (4th Ed.) P
- (b) “If the hereditament mean the right itself, that is always incorporeal, not less in the case of what are called corporeal than what are called incorporeal hereditaments. If the hereditament mean that subject of the right, the subject of an incorporeal hereditament is as corporeal as the subject of a corporeal hereditament.” (*Ibid.*) See *Digby’s R.P.* p. 305. Q

6.—“*Tenure.*”(1) *Conception of “tenure,” the foundation of the English law of property.*

- (a) Under the English Law, it cannot be said that a person is the absolute owner of land but, he could only be a “tenant,” or holder of it for an “estate” (*i.e.*), an interest giving him and his successors in title a right to the occupation and enjoyment of it, or its rents and profits, for a period which is indefinite or uncertain as to its duration, but is not perpetual; and upon the determination of which the land reverts to the person of whom it is held, who is called the “lord.” *Goode’s R.P.* 19 (1906). See *Digby R.P.* 60, 61. R

6.—“*Tenure*”—(Concluded).

- (b) The common idea prevailing in England is that all lands are vested in the Crown, which grants them to its subjects by the process known as “*infodation*” (i. e.), to hold for various “*estates*” (i. e.), to use and enjoy during the subsistence of those estates. *Coke Litt.* 1a, 65a, 98a. *Attorney-General of Ontario v. Mercer*, 8 A.C. 767, per Lord Selbourne, C. 8

(2) *Tenure*—Meaning of.

The manner by which one holds land of another, under English Law, is called “*tenure*.” *Goodeve’s R.P.* p. 20. T

7.—“*Estate or interest*.”(1) “*Interest*,” meaning of—English Law.

By the term—, is meant that amount of ownership which the law recognises as conferring, what is technically termed, “*an estate*” in its subject-matter. See *F. and M. Hist.* n. 10. *Williams, R.P.* 7. U

(2) Common meaning of “*Interest*.”

As to—, see *Co. Litt.* 315 b, *Elph. N. and C. Interp.* 205. Y

(3) *Estate*—Scope and meaning of the term.

Estate signifies such inheritance, freehold, term for years, tenancy by statute merchant, staple, *elegit*, or the like, as any man has in lands or tenements. *Co. Litt.* 315 a. W

(1) “*Estates*” only in “*Realty*”—No “*estates*” in “*Personalty*”—English Law.

(a) Personal property, under English Law, being essentially the subject of absolute ownership, cannot be held for any estate. See *M.L.P.P.* p. 7. X

(b) “*Realty*” only could be held for various “*estates*.” See p. 30 *Goodeve’s R.P.* (1906). Y

(5) *Estates under English Law*.

(a) ORDINARY ESTATES.

The ordinary estates are estates of inheritance (including under the term “*estates in fee simple*” and “*estates in fee tail*”), and estates for life. *Goodeve’s R.P.* p. 19 (1906) Z

(b) ESTATES, HOW CREATED.

Under the English Law, special and technical words must be used to create the various estates. As to such technical words, or “*imitations*” as they are called. See pp. 33, 78 and 126 of *Goodeve’s R.P.* (1906). A

8.—“*Annuity*.”(1) What is “*annuity*.”

An annuity is a yearly payment of a certain sum of money granted to another in fee for life or years, charging the person only. *Co. Litt.* 144 b. B

(2) *Annuity*—Common instance of.

The most common instance of such “*annuities*” is payment of rents, which, under English Law, is of three kinds (*viz.*), “*rent-service*,” “*rent-charge*” and “*rent-seck*.” *Litt.S.* 213. See *Elph. N. and C. Inter.* p. 617. C

(3) *Annuity*, an “*incorporeal hereditament*.”

Under the English Law, an annuity is considered to be an “*incorporeal hereditament*.” *Goodeve R.P.* p. 12. D

9.—“*Transferable by deed.*”**Conveyance under English Law.**

- (a) The most ancient mode of conveyance under English Law was a “feoffment.” See Butler’s note to Co. Litt. 271 b. 4 Cruise Dig. 46. **E**
- (b) As to the formalities therefor, see pp. 357 and 358 of Goodeve’s R.R. (1906). **F**
- (c) In England, after the year 1845, a “feoffment” could be evidence by a “deed.” See Real Property Act (1845), 8 & 9 Vic., C. 106, S. 3. **G**

10.—“*By deed accompanied by other formalities.*”**Formalities necessary for conveyance by “deed”—English Law.**

- (a) The transferor or his attorney, together with the transferee, or his attorney, come to the land or to the house (the subject of transfer) and there in the presence of witnesses declare the contents of the deed. 2 Bl. 315; Challis R.P. 365; Co. Litt. 48a. **H**
- (b) And then, if the subject of transfer be land, the transferor actually delivers to the transferee, all other persons being out of ground at the time, a clod or turf, or a twig or bough there growing, with words to this effect “I deliver these to you in the name of ‘seisin’ of all the lands and tenements contained in this deed.” (*Ibid.*) **I**
- (c) But, if the subject of transfer be a house, the transferor must take the ring or latch of the door, the house being quite empty, and deliver the same to the transferee in the same form, and then the transferee must enter alone, and shut the door and then open it, and let in the others. (*Ibid.*) **J**
- (d) If the conveyance be in respect of different lands, lying scattered in one and the same county, then in the transferor’s possession, mere delivery or “seisin” of any parcel in the name of the rest is sufficient for all. (*Ibid.*) **K**
- (e) But, if the lands lie in several counties, there must be as many deliveries as there are counties, the reason being that, if the title to these lands is subsequently disputed, there must be as many trials as there are counties. (*Ibid.*) **L**
- (f) Originally, the delivery was required to be made before the peers or freeholders of the neighbourhood, who must attest such delivery in the body or on the back of the deed. (*Ibid.*) **M**
- (g) Subsequently, the usual practice came to be established (*viz.*) to endorse the “livery” or delivery of “seisin” on the back of the deed, specifying the manner, place, and time of making it together with the names of the witnesses. (*Ibid.*) **N**

11.—“*Vested estate*”**(1) “Vest,” meaning of.**

- (a) The words “to vest” have several senses. Originally, the word had reference only to real estate. As applied to “estates in land,” “to vest” signifies the acquisition of a portion of the actual ownership of the land; the acquisition, not of an estate in possession, but of an actual estate. The “fee simple” being supposed to be carved out into parts or divisions by the creation of particular estates, a grant to any person of one of these portions of the fee vested him with, or vested in him, an estate in the land. Thus “vested” is nearly equivalent to “possessed.” Wills by Hawkins, p. 221. **O**

11.—“Vested estate”—(Concluded).

- (b) In this, its original sense, “vested” has no reference to the absence of conditionality or contingency. For example, where an estate is limited to “A for life with rem under to B,” B’s estate is a vested estate, because such a remainder vests in B an actual portion of the “fee,” though the time of its falling into possession is wholly contingent and uncertain. B is invested with a portion of the ownership of the land (*Ibid*) **P**

(2) Vested estate distinguished from “estate in possession”—English Law.

An estate in possession is one conferring an immediate right to present enjoyment. A vested estate is, strictly speaking, an “estate in expectancy” or a “future estate” conferring a right to enjoyment at a future time, (Goodeve R I 200 (1906) **Q**

(3) Vested estate, nature of

A “vested estate” under the English Law, is otherwise called a “vested remainder” such estate being an estate in expectancy. A vested estate does not confer upon the person to whom the estate is “limited,” an immediate present right to enjoyment but his enjoyment is postponed until the happening of a certain particular event, which must necessarily happen one day or the other. (Goodeve, p 211 (1906) **R**

(4) Vested estate definition of

(a) Goodeve defines the expression as follow —“A vested remainder is one which is necessarily capable of taking effect on the determination of the particular estate on which it is expectant.” (Goodeve p 211 (1906) **S**

(b) The person entitled to a “vested remainder” has an immediate fixed right of future enjoyment that is an estate *in present*, though it is only to take effect in possession and permanency of profits at a future period. 2 Cruise Dig 204 **T**

(5) Vested estate examples of

If land be given to

(a) “A for life, remainder to B.” Here the estate given to B is a vested estate for as soon as the present life estate of A drops B’s estate takes effect in possession. So the enjoyment by B of the estate given to him is postponed until the happening of a particular event, on which it is expectant. (Goodeve, p 211 (1906) **U**

(b) “To A for ten years, with remainder to B.” Here, as is mentioned in the last illustration, B’s estate takes effect, after the enjoyment by A, of the estate for ten years. (*Ibid*) **V**

12.—“Whether for life.”

(1) Definition of “life estate”

A “life estate” is an estate held on condition of being held during the subsistence of a life or lives. Co Litt 41 b Chubb R P 311 **W**

(2) Life-estate—Two kinds

The life for which the estate is held may be either that of the person to whom the grant is made or it may be the life of some other person, or even the life of some animal or thing. (Goodeve, p 211 (1906) **X**

12.—“Whether for life”—(Concluded).

(3) Life-estate, examples of.

- (a) The most ordinary form of “limitation” in respect of a life-estate is “To A for life.” Goodeve, p. 33 (1897), 4th Ed. Y
- (b) Another kind of “limitation” in respect of the creation of a life-estate is “To A for the life of B.” Here the estate given to A subsists as long as B lives and the estate drops as soon as B dies. (*Ibid.*) Z

(4) Vested life-estate, example of.

Where the settlor introduces the following ‘limitations’ in the settlement (*viz.*, “To A, remainder to B for life” the life-estate given to B is a vested one, because it takes effect (*i.e.*), B comes into enjoyment of property after the death of A. Goodeve, p. 240 (1897), 4th Ed. A

13.—“Or of a greater or less description.”

(1) Estates of greater description than an “estate for life”—English Law.

- (a) Under the English Law, “estates of inheritance” are bigger than an “estate for life.” By the term “estates of inheritance,” is meant those estates which are descendible to the heirs of the grantee, unlike the “life-estate” which could be enjoyed by the grantee only during his life and which are not descendible to his heirs. See pp. 82 and 83 of Goodeve (1897), 4th Ed. and Co. Litt. 1 b. B
- (b) Such “estates of inheritance,” are of two kinds (*viz.*) “estate in fee simple” and “estate tail.” Goodeve, pp. 81 and 60 (4th Ed.) (1897). C

N.B.—Under the English Law, special technical words must be used to create “estates in fee simple” and “estates in fee-tail” or (as it is generally called) “estates tail.” Such technical words are called “words of limitations.” As to those “words of limitation,” see pp. 60, 81, 82, Goodeve (1897). (R.P.)

(2) Estates of less description than a “life-estate”—Examples of.

- (a) Such estates are “estates less than freehold.” Goodeve, p. 151 (1897), 4th Ed. D
- (b) (i) The most ordinary form of an estate which is of a less description than a life-estate, is, what is termed “an estate for years,” Goodeve, p. 158 (1897), 4th Ed. E
- (ii) An estate for years is “a contract for the possession of lands or tenements for some determinate period; and it takes place where a man lets them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon,” Vol. ii, Co. Litt. 43 b. F
- (c) Where the settlor introduces the following “limitations” in a settlement (*viz.*), “To A, remainder to B for ten years,” the estate given to B under the settlement is a vested one, since the enjoyment of it is postponed till after the death of A and it is less than a “life-estate,” since it is only a “term of years” granted to B. Goodeve, p. 240 (1897). G

14.—“*In possession.*”

“Estate in possession,” definition of—Example.

- (a) An estate in possession is one conferring an immediate right to present enjoyment. (Goodeve, p. 227 (1897), 4th Ed. **H**)
- (b) Where land is limited to “To A for life,” A acquires an estate in possession and he has got a present right to present enjoyment. (*Ibid.*) **I**

15.—“*Futurity or expectancy in any immoveable property.*”

“Estate in expectancy,” definition of—Example.

- (a) An estate in expectancy is one conferring a right to enjoyment at a future time (Goodeve, p. 297 (1897). **J**)
- (b) Where an estate is limited to “A for life, remainder to B for life,” B’s estate is an “estate in expectancy” since B comes into enjoyment of the property at a future time (i. e.) after the dropping of the prior life estate of A. (Goodeve, pp. 228 and 240 (1897). **K**)

16.—“*Contingent right . . . property.*”

(1) “Contingent”—meaning of.

- (a) An estate is contingent when a right of enjoyment is to accrue on an event which is dubious and uncertain. (Ferne C.R. p. 2. **L**)
- (b) A “contingent remainder” is one which will not come into effect on the determination of the “particular estate” on which it is expectant, unless some event which may or may not happen, does happen before, or simultaneously with, such determination. In other words, it is subject to a condition precedent. (Ferne C.R. p. 2. **M**)

(2) Contingent right—Nature of.

A person entitled to a contingent remainder has no present right of property, His right cannot arise until the condition is performed, or, the estate commences at a future time in interest as well as in possession. (Goodeve R.P., p. 241 (1897). **N**)

17.—“*Contingent or executory interest.*”

(1) “Executory interest,” nature of—English Law.

- (a) At common law the land itself could not be devised. But the Statute of Wills (32 Hen. VIII C 1.) enacted that the land itself (i.e., the legal estate) could be disposed of by will. Devises of this nature which take effect in derogation of the rules of common law are called “executory devises.” (*Farington v. Dart*, Y.B. 9 Hen. VI at 24 b. **O**)
- (b) The term “executory devise” properly indicates the mode in which the interest is created; but it is commonly used to indicate the interest itself. (Challis R.P. 65, 66. **P**)
- (c) The earliest instance of an “executory devise” occurred in the case of directions given by testators that their executors should sell their tenements, (*Farington v. Dart*, Y.B. 9 Hen. VI at 24 b. **Q**)

18.—“Or possibility...ascertained.”

Executory devises—Possible, not actual, events considered.

(a) Under English Law, in the case of all executory limitations, possible, and not actual events are alone considered. *Joe v. Andley*, 1 Cox. 321. **R**

(b) If land be limited to “A and his heirs, remainder, on failure of the issue of B, to C and his heirs,” it is evident that, though the issue of B may fail in the life-time of A, it possibly may not fail for centuries; and during that period the property would be alienable, inasmuch as A or his heirs cannot bar or destroy the interest limited to C, as it is an executory devise. Goodeve p. 287 (1897). **S**

19.—“A right of entry...vested or contingent.”

(1) Alienability of rights of entry—English Law.

Under the Real Property Act, 1845 (8 and 9 Vic., C. 106, S. 6), a right of entry whether immediate or future, and whether vested or contingent, into or upon any tenements or hereditaments in England of any tenure may be disposed of by deed. **T**

(2) Provision for right of entry.

In ordinary leases, it is usual to stipulate an express provision for a right to re-enter on non-payment of rent. Elphinstone's Introduction, p. 230; see p. 172, Goodeve (1897). **U**

20.—“Convey and conveyance...necessary or suitable assurance.. together with...formalities.. conveyance.”

(1) The words “convey” and “conveyances,” when used.

The words—are popularly used in regard to “assurances” generally, whether of “freehold” or “leasehold” Goodeve, p. 375 (1897). **Y**

(2) Several modes of “conveyance” or “assurance” under English Law.

In England, various modes of “assurances” have, from time to time, been adopted for transferring land from one person to another. Goodeve, p. 364 (1897). **W**

(3) Ancient mode of conveyance.

(a) The most ancient mode of conveyance by a subject was, what is known as, a “feoffment.” Burton, Comp. Ch. I. S. 1. **X**

(b) As to how a “feoffment” is usually made in England, see Goodeve's R.P. (1897) p. 361. **Y**

(4) Modes of “assurances” under the English Law.

The most important of the several modes of conveyances under the Law of England are—

(i) “Feoffment”—see notes, *supra* **Z**

(ii) “Grant” (*i.e.*) a deed unaccompanied by “livery of seisin.” This form of conveyance was applicable only to “incorporeal hereditaments,” which are said to “lie in grant and not in livery.” Co. Litt. 172 a; 4 Byth, and Jarn. 105; 2 Sand. Us. 29. **A**

(iii) “Release” (*i.e.*), the conveyance of a man's interest or right in which he has to a thing, to another, who has possession thereof, or some estate therein. 4 Cruise Dig. 77; Challis R.P. 375. **B**

N.B.—Such “release” should be evidenced by “deed,” Co. Litt. 264 b,

20.—“Convey and conveyance—necessary or suitable assurance—together with—formalities—conveyance.”—(Concluded).

(iv) “Lease and release”—As time advanced, the inconveniences involved in the ancient modes of transfer were keenly felt by the public and several devices were invented to obviate the difficulties; one of them being the conveyance known as “Lease and release.” The process is this. A lease is made to the person to whom the land is to be conveyed; and after he had entered into possession under his lease, a “Release” is executed to him of the “fee.” He thus acquires an estate “in fee” as effectually as if a regular conveyance had been made to him. Co. Litt. 270 a. See 2 Sand. Us. 74; 4 Cruise. Dig. 113; Williams R.P. 154, 194. **C**

(v) Assignment of leases—which by the Real Property Act (1845), must be by deed. 8 and 9 Vic., C. 106, S. 3. **D**

(2) Formalities to be observed in respect of the several “assurances.”

As to —, see pp. 364 to 380. Goodeve (1897). **E**

21.—“Tenants-in-tail.”

(1) “Estate tail,” nature of—English Law.

An “estate tail” is an “estate of inheritance.” It devolves upon successive owners in a course of descent; but it descends only to the heirs who issue from the body of the original donee, 4 Cruise. Dig. 51 (S. 33). **F**

(2) Estate tail, how created.

The technical “words of limitation” generally used for creation of such an estate are “heirs of the body of A.” For example if an estate tail be limited to “A and the heirs of his body,” the estate descends successively to the lineal descendants issuing from the body of A (the donee). See pp 60, and 61, Goodeve (1897). **G**

(3) Divisions and sub-divisions of “estate tail.”

See p. 61, Goodeve (1897). **H**

(4) Tenant-in-tail after possibility of issue extinct.

Where a limitation is in “tail special,” as for instance “To A and the heirs of his body by his wife M,” it may happen that, under given circumstances, it becomes impossible that there should be any issue (heir of the body of the donee in tail) of the prescribed class (*s. e.*), the donee A may not beget an heir by his wife M, and the wife may die leaving no issue. In such cases the tenant-in-tail is termed “tenant-in-tail after possibility of issue extinct” Co. Litt, 27 b; Challis R.P. 261, 263. **I**

22.—“Including the acts... provisions of Act XXXI of 1854.”

(1) Disposition by tenant-in-tail, how effected.

Every tenant-in-tail or other owner of an estate of inheritance less than an estate in fee-simple, either at law or in equity, in any lands or hereditaments shall have power to dispose them of, or to enlarge into an estate in fee simple by any deed declaring an intention so to dispose of the said lands or to enlarge his estate therein. See S. 2 of Act XXXI of 1854. **J**

(2) Disposition by married woman—Acts, etc., to be performed for validating the transfer.

For the acts to be performed and the formalities to be gone through, for validating any disposition by a married woman. See Ss. 3 to 12 (both inclusive of Act XXXI of 1854). **K**

23.—“The words ‘trust’ and ‘trustee’...constructive trusts.”

(1) Trust, definition of.

See S. 3 of Indian Trusts Act and notes thereto.

L

(2) “Implied” and “constructive” trusts, definitions of.

For definition of—, see notes on S. 3 of the Indian Trusts Act (II of 1882).

M

(3) Constructive trusts—Cases where such trusts are raised.

For cases—, and other details in connection therewith, see Ss. 87 to 91 (both inclusive) of the Indian Trusts Act and notes thereto.

N

24.—“Heir shall mean ..deceased person.”

(1) Heir—Conception of the term—English Law.

According to the Law of England, no inheritance can vest, nor can any person be the actual heir of another till the ancestor is previously dead. Before that time, the person who is next in the line of succession is called an “heir apparent” or “heir presumptive.” 2 Blackstone 208.

O

(2) “Heir apparent” distinguished from “heir presumptive”—English Law.

“Heirs apparent” are such, whose right of inheritance is indefeasible provided they outlive the ancestor. While “heirs presumptive” are such, who, if the ancestor should die immediately, would in the present circumstances of things be his heirs; but whose right of inheritance may be defeated by the contingency of some nearer heir being born. 2 Bl. 208.

P

25.—“Not as heir...laws concerning devise and descent.”

(1) Rules or canons of descent—English Law.

The rules of descent in England had been the same for about 400 years, when Lord Hale reduced them to a series of canons. These rules as modified subsequently by the Inheritance Act (1833, 3 and 1 Will. 4, C. 106) still prescribe the course of descent in England. See pp. 143, 144 of Goodeve (1897).

Q

(2) Such canons of descent seven in number.

For enunciation of the canons and other details in connection therewith, see pp. 144—150, Goodeve (1897).

R

26.—“Mortgage shall...security for money.”

Mortgage, definition of.

For the definition of a “mortgage of immoveable property,” see S. 58 of Act IV of 1882, and compare.

S

3. The powers and authorities given by this Act to the High Courts

High Court to have jurisdiction in what cases.

shall and may be exercised only in cases to which English law is applicable¹, and may be exercised with respect to property within the local limits of the extraordinary original civil jurisdiction of the said

Courts respectively².

(Notes).

(General).

Scope and effect of section.

- (a) Sec. 3 of the Indian Trustee Act which provides that the power and authority given by the Act to the High Court shall be exercised only "in cases to which English Law is applicable, cannot be intended to limit the operation of the Act only to cases to which, in their whole extent, the law prevailing in England applies without qualification or reserve, as this would virtually exclude the Act in any case on which an Act of the Indian Legislature has any bearing. 5 B. 154. T
- (b) The cases referred to in the section must be cases to which English Law is, in some measure, applicable, but in what measure, is not indicated in the Act. (*Ibid.*) U
- (c) English Law must be regarded as applicable in the sense intended if the principles recognised by the English Equity Courts are applicable. (*Ibid.*) Y

1.—"The powers and authorities to which the English law is applicable."**(1) Establishment of Supreme Courts in India—Effect of, on the administering of Law in India.**

- (a) At the date of the grant of the Charter for establishment of Supreme Courts in India, English Equity had become a system which would deal with a body of *quasi* common law in a scientific manner, and in obedience to known and uniform rules. 5 B. 154. W
- (b) When it applied its method to the determination or constitution of a right, even based on Hindu and Mahomedan Law, it administered English Law. (*Ibid.*) X
- (c) In this sense "English Law" was applicable at the date of the passing of the Indian Trustee Act, 1866, to all cases in which peculiarly equitable doctrines had obtained recognition in the relations between the native inhabitants. Those doctrines could not be employed to subvert the native substantive laws, but they afforded a means of ameliorating them by a system of rules borrowed from the English Court of Equity. (*Ibid.*) Y

(2) Trusts in Hindu and English Law—How Courts give effect to them.

- (a) Trusts are recognised in the Hindu as well as in the English system of Law. But, while the substantive Hindu law insists strongly on the suppression of fraud and the fulfilment of promises, it fails to furnish the detailed rules by which effect is to be given to its principles in cases of trusts. 5 B. 154. Z
- (b) If the Court is called upon to give effect to a trust in any given case, it looks to the Hindu law of property to determine the estate of the trustee, but with reference to the duties of the trustee and the rights of beneficiaries, it is governed by the rules of English Equity. There are no others that it can apply. (*Ibid.*) A
- (c) In meeting an exigency or in taking cognizance of a form of right, not directly provided for in the Shastras, the Court in exercising its jurisdiction under S. 41 of the Charter Act of 1823, may apply Hindu Law. But, taking Hindu Law as one of its *data*, it applies "English Law" also in the form of equity to all or nearly all the questions that arise. (*Ibid.*) B

2.—“*May be exercised...said Courts respectively.*”

Hindu Trusts—Powers of High Court under the Indian Trustee Act in respect of.

In the case of Hindu Trusts, it is competent to the High Court to exercise summary powers conferred upon it by the Indian Trustee Act (XXVII of 1866). 5 B. 154. C

4. When any lunatic or person of unsound mind shall hold any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order that such property be vested in such person or persons in such manner and for such estate as the said Court shall direct: and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a conveyance of the property in the same manner for the same estate.

High Court may convey estates of lunatic trustees and mortgagees;

5. When any lunatic or person of unsound mind shall be entitled to any contingent right¹ in any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right or disposing of the same to such person or persons as the said High Court shall direct; and the order shall have the same effect as if the trustee or mortgagee had been sane, and had duly executed a deed so releasing or disposing of the contingent right.

and may convey contingent rights.

(Note).

1.—“*Shall be entitled to any contingent right.*”

See notes on S. 2, *supra*.

6. When any lunatic or person of unsound mind shall be solely entitled to any stock or Government securities, or to anything in action upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest, in respect thereof;

High Court may transfer stock or Government securities of lunatic trustees and mortgagees.

and when any person or persons shall be entitled jointly with any lunatic or person of unsound mind to any stock or Government securities, or thing in action, upon any trust or by way of mortgage, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, either in such person or persons so jointly

entitled as aforesaid, or in such last-mentioned person or persons together with any other person or persons the said High Court may appoint.

7. When any stock or Government securities shall be standing in the name of any deceased person whose executor or administrator is a lunatic or person of unsound mind, or when anything in action shall be vested in any lunatic or person of unsound mind as the executor or administrator of a deceased person, it shall be lawful for the High Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof in any person or persons the said Court may appoint.

8. Whenever any minor shall hold any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order vesting such property in such person or persons in such manner and for such estate as the said Court shall direct, and the order shall have the same effect as if the minor trustee or mortgagee had attained his majority, and had duly executed a conveyance of the property in the same manner for the same estate.

9. Where any minor shall be entitled to any contingent right¹ in any immoveable property upon any trust or by way of mortgage, it shall be lawful for the High Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said Court shall direct, and the order shall have the same effect as if the minor had attained his majority, and had duly executed a deed so releasing or disposing of the contingent right.

(Note).

1.—“Where any minor....contingent right.”

See notes on S. 2, *supra*.

10. When any person solely holding any immoveable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order vesting such property in such person or persons, in such manner and for such estate as the said Court shall direct, and the order shall have the same effect as if the trustee had duly executed a conveyance of the property in the same manner and for the same estate¹.

(Note).

1.—“For the same estate.”

See notes on S. 2, *supra*.

11. When any person or persons shall hold any immoveable property in trust jointly with a person not within the jurisdiction of the High Court, or who cannot be found, it shall be lawful for the said Court to make an order vesting the property in the person or persons so jointly holding, or in such last-mentioned person or persons together with any other person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance of the property in the same manner for the same estate¹.

High Court may make order where persons hold immoveable property in trust jointly with persons out of jurisdiction.

(Note).

1.—“For the same estate.”

See notes on S. 2, *supra*.

12. When any person solely entitled to a contingent right in any immoveable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order wholly releasing such property from such contingent right, or disposing of the same to such person or persons as the said Court shall direct; and the order shall have the same effect as if the trustee had duly executed a conveyance so releasing or disposing of the contingent right.

Contingent rights of trustees.

(Note).

1.—“Contingent rights of trustees.”

See notes on S. 2, *supra*.

13. When any person jointly entitled with any other person or persons to a contingent right in any immoveable property upon any trust shall be out of the jurisdiction of the High Court, or cannot be found, it shall be lawful for the said Court to make an order disposing of the contingent right of the person out of the jurisdiction, or who cannot be found, to the person or persons so jointly entitled as aforesaid, or to such last-mentioned person or persons together with any other person or persons; and the order shall have the same effect as if the trustee out of the jurisdiction, or who cannot be found, had duly executed a conveyance so releasing or disposing of the contingent right.

High Court may make order where persons jointly entitled with others out of jurisdiction to contingent right in immoveable property.

14. Where there shall have been two or more persons jointly holding any immoveable property upon any trust, and it shall be uncertain which of such trustees was the survivor, it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate as the said Court shall direct; and the order shall have the same effect as if the survivor of such trustees had duly executed a conveyance of the property in the same manner for the same estate.

When uncertain which of several trustees survived.

15. Where any one or more person or persons shall have hold any immoveable property upon any trust, and it shall not be known, as to the trustee last known to have held such property, whether he be living or dead, it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate, as the said Court shall direct; and the order shall have the same effect as if the last trustee had duly executed a conveyance of the property in the same manner for the same estate¹.

When uncertain whether last trustee living or dead.

(Note).

1.—“*Executed a conveyance of the....estate*”

For notes on “CONVEYANCE” and “ESTATE,” see S. 2, *supra*.

16. When any person holding any immoveable property upon any trust shall have died intestate as to such property without an heir, or shall have died, and it shall not be known who is his heir or devisee¹, it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate, as the said Court shall direct; and the order shall have the same effect as if the heir or devisee of such trustee had duly executed a conveyance of the property in the same manner for the same estate.

When trustee dies without heir.

(Note).

1.—“*It shall not be known....devisee.*”

Heir, definition of.

See notes on S. 2, *supra*.

17. When any immoveable property is subject to a contingent right¹ in an unborn person, or class of unborn persons, who, upon coming into existence, would in respect thereof hold such property upon any trust, it shall be lawful for the High Court to make an order which shall wholly release and discharge such property from such contingent right, in such unborn person or class of unborn persons, or to make an order which shall vest in any person or persons the estate or estates which such unborn person or class of unborn persons would, upon coming into existence, hold in such property.

Contingent right of unborn trustee.

(Note).

1.—“Contingent right.”

See notes on S. 2, *supra*.

18. In every case where any person holds or shall hold jointly or solely any immoveable property, or is or shall be entitled to a contingent right therein upon any trust, and a demand shall have been made upon such trustee by a person entitled to require a conveyance of such property, or a duly-authorized agent of such last-mentioned person, requiring such trustee to convey the same, or to release such contingent right, it shall be lawful for the High Court, if the said Court shall be satisfied that such trustee has wilfully refused or neglected to convey the said property for the space of twenty-eight days after such demand, to make an order vesting such property in such person or persons, in such manner and for such estate as the Court shall direct, or releasing such contingent right in such manner as the Court shall direct; and the said order shall have the same effect as if the trustee had duly executed a conveyance of the property, or a release of such right, in the same manner and for the same estate.

19. When any person to whom any immoveable property has been conveyed by way of mortgage shall have died without having entered into the possession or into the receipt of the rents and profits thereof, and the money due in respect of such mortgage shall have been paid to a person entitled to receive the same, or such last-mentioned person shall consent to an order for the reconveyance or vesting of such property, then in any of the following cases it shall be lawful for the High Court to make an order vesting such property in such person or persons, in such manner and for such estate as the said Court shall direct, that is to say,—

when an heir or devisee of such mortgagee shall be out of the jurisdiction of the High Court, or cannot be found:

when an heir or devisee of such mortgagee shall, upon a demand by a person entitled to require a conveyance of such property, or a duly-authorized agent of such last-mentioned person, have stated in writing that he will not convey the same, or shall not convey the same for the space of twenty-eight days next after a proper deed for conveying such property shall have been tendered¹ to him by a person entitled as aforesaid, or a duly-authorized agent of such last-mentioned person:

when it shall be uncertain which of several devisees of such mortgagee was the survivor:

when it shall be uncertain as to the survivor of several devisees of such mortgagee or as to the heir of such mortgagee, whether he be living or dead:

when such mortgagee shall have died intestate as to such property and without an heir, or shall have died, and it shall not be known who is his heir or devisee:

and the order of the said High Court made in any one of the foregoing cases shall have the same effect as if the heir or devisee, or surviving devisee, as the case may be, had duly executed a conveyance of the property in the same manner and for the same estate.

(Notes).

N B.—See notes on S. 20. *infra*.

1.—“After a proper deed . . . tendered.”

Conveyances under the English law.

See notes on S. 2, *supra*.

20. In every case where the High Court shall, under the provisions of this Act, be enabled to make an order having the effect of a conveyance of any immoveable property, or having the effect of a release or disposition of the contingent right of any person or persons, born or unborn, it shall also be lawful for the High Court, should it be deemed more convenient to make an order appointing a person to convey such property, or lease or dispose of such contingent right;

Power to appoint person to convey in certain cases.

and the conveyance, or release or disposition of the person so appointed, shall, when in conformity with the terms of the order by which he is appointed, have the same effect, in conveying the property, or releasing or disposing of the contingent right, as an order of the High Court would in the particular case have had under the provisions of this Act.

In every case where the High Court shall, under the provisions of this Act, be enabled to make an order vesting in any person or persons the right to transfer any stock transferable in the books of any company or society established or to be established, it shall also be lawful for the High Court, if it be deemed more convenient, to make an order directing the secretary or any officer of such company or society at once to transfer, or join in transferring, the stock to the person or persons to be named in the order:

and this Act shall be a full and complete indemnity and discharge to all companies or societies and their officers and servants for all acts done or permitted to be done pursuant thereto.

(Notes).

1.—“ Power to appoint person to convey in certain cases.”

Persons out of jurisdiction and under other disabilities—Court's power to appoint person to convey property on behalf of.

(a) Where property has been, by an order of Court, directed to be sold and where some of the parties interested in such property are either out of the jurisdiction, married women or minors, and the place of abode of others of them is unknown, the Court will, on petition, under the Indian Trustee Act appoint a person to convey the interest of such persons to any purchaser, notwithstanding that, at the time the order is applied for, no contract for the sale of the property has been entered into. 7 C. 32. **D**

(b) But the Court cannot make an order with respect to the interest of a party who has not been served, and who has not entered appearance. (*Ibid.*) **E**

21. When any person or persons shall be jointly entitled with any person out of the jurisdiction of the High Court,

When trustees of stock or Government securities joined with trustees out of jurisdiction.

or who cannot be found, or concerning whom it shall be uncertain whether he be living or dead, to any stock or Government securities or thing in action upon any trust, it shall be lawful for the said

Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for or recover such thing in action or any interest in respect thereof, either in such person or persons so jointly entitled as aforesaid, or in such last-mentioned person or persons together with any person or persons the said Court may appoint.

When any sole trustee of any stock, Government securities, or thing in action shall be out of the jurisdiction of the said Court, or cannot be found, or it shall be uncertain whether he be living or dead, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in any person or persons the said Court may appoint.

22. Where any sole trustee of any stock, Government securities, or thing in action, shall neglect or refuse to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for or recover such thing in action, or any interest in respect

When trustee of stock, etc., refuses to transfer.

thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person absolutely entitled thereto, it shall be lawful for the High Court to make an order vesting the sole right to transfer such stock or Government securities, or to receive

the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

23. Where any one of the trustees of any stock, Government securities, or thing in action, shall neglect or refuse to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for or recover such thing in action according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by such person, it shall be lawful for the High Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, in the other trustee or trustees of the said stock, Government securities, or thing in action, or in any person or persons whom the said Court may appoint jointly with such other trustee or trustees.

24. When any stock or Government securities shall be standing in the sole name of a deceased person, and his executor or administrator shall be out of the jurisdiction of the High Court, or cannot be found, or it shall be uncertain whether such executor or administrator be living or dead, or such executor or administrator shall neglect or refuse to transfer such stock or Government securities, or receive the dividends, interest, or income thereof, according to the direction of the person absolutely entitled thereto, for the space of twenty-eight days next after a request in writing for that purpose shall have been made to him by the person entitled as aforesaid, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, in any person or persons whom the said Court may appoint.

25. Where any order shall have been made under this Act vesting the right to any stock or Government securities ¹ in any person or persons appointed by the High Court, such legal right shall vest accordingly, and thereupon the person or persons so appointed are hereby authorized and empowered to execute all deeds and powers-of-attorney, and to perform all acts relating to the transfer of such stock and Government securities into his or their own name or names or otherwise, or relating to the receipt of the dividends, interest, or income thereof, to the extent and in conformity with the terms of such order.

Obligation to comply with requisition of person invested. All companies and associations whatever, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made, and shall be equally indemnified in complying with the requisition of such person or persons so appointed as they would have been indemnified in complying with the requisition of the person in whose place such appointment shall have been made.

Indemnity.

Termination of powers of person replaced. After notice in writing of any such order of the High Court concerning any stock or Government securities shall have been given, it shall not be lawful for any company or association, or any person having received such notice, to act upon the requisition of the person in whose place an appointment shall have been made, in any matter relating to the transfer of such stock or Government securities, or the payment of the dividends, interest, or income thereof.

(Notes).

1.—“Where any order...Government securities.”

(1) Vest, meaning of.

See notes on Sec 2, *supra*.

F

(2) Distinction between “Vested” “and contingent.”

See notes on Sec. 2, *supra*.

G

26. Where any order shall have been made under this Act by the High Court, vesting the legal right to sue for or recover any thing in action, or any interest in respect thereof, in any person or persons, such legal right shall vest accordingly, and thereupon it shall be lawful for the person or persons so appointed to carry on, commence, and prosecute, in his or their own name or names, any suit or other proceeding for the recovery of such thing in action, in the same manner in all respects as the person in whose place an appointment shall have been made could have sued for or recovered such thing in action.

Effect of order vesting legal right in thing in action.

27. Where any person shall neglect or refuse to transfer any stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for or recover anything in action, or any interest in respect thereof, for the space of twenty-eight days next after an order of the High Court for that purpose shall have been served upon him, it shall be lawful for the said Court to make an order vesting all the right of such person to transfer

On neglect to transfer stock, &c., for twenty-eight days, order made vesting right to transfer in such person as Court appoints.

such stock or Government securities, or to receive the dividends, interest, or income thereof, or to sue for and recover such thing in action, or any interest in respect thereof, in such person or persons as the said Court may appoint.

28. When any stock or Government securities shall be standing in the sole name of a deceased person, and his executor or administrator shall refuse or neglect to transfer such stock or Government securities, or receive the dividends, interest, or income thereof for the space of twenty-eight days next after an order of the High Court for that purpose shall have been served upon him, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, in any person or persons whom the said Court may appoint.

Similar order on like neglect by executor.

29. When any order being or purporting to be under this Act shall be made by the High Court, vesting the right to any stock or Government securities, or vesting the right to transfer any stock or Government securities, or vesting the right to call for the transfer of any stock or Government securities, in any person or persons, in every such case the legal right to transfer such stock or Government securities shall vest accordingly ;

and the person or persons so appointed shall be authorized and empowered to execute all deeds and powers-of-attorney, and to perform all acts relating to the transfer of such stock or Government securities into his or their own name or names or otherwise, to the extent and in conformity with the terms of the order.

Powers of person appointed.

All companies and associations, and all persons, shall be equally bound and compellable to comply with the requisitions of such person or persons so appointed as aforesaid, to the extent and in conformity with the terms of such order, as such companies, associations, or persons would have been bound and compellable to comply with the requisitions of the person in whose place such appointment shall have been made.

Obligation to comply with his requisitions.

30. When any minor shall be solely entitled to any stock or Government securities upon any trust, it shall be lawful for the High Court to make an order vesting in any person or persons the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof.

Power to make order for transfer or receipt of dividends of stock, &c., in name of minor trustee.

When any minor shall be entitled jointly with any other person or persons to any stock or Government securities upon any trust, it shall be lawful for the said Court to make an order vesting the right to transfer such stock or Government securities, or to receive the dividends, interest, or income thereof, either in the person or persons jointly entitled with the minor, or in him or them together with any other person or persons the said Court may appoint.

31. When a decree or order shall have been made by the High Court directing the sale of any immoveable property for the payment of the debts of a deceased person, every person holding such property, or entitled to a contingent right therein, as heir, or under the will of such deceased debtor, shall be deemed so to hold or be entitled (as the case may be) upon a trust within the meaning of this Act 1:

When decree made for sale of immoveable property for payment of debts.

and the High Court is hereby empowered to make an order wholly discharging the contingent right, under the will of such deceased debtor, of any unborn person.

(Note).

1.—“ Shall be....meaning of this Act. ”

Trust for payment of debts.

For detailed notes in respect of particulars in connection with ———, See notes on Ss. 11, and 15 of Indian Trusts Act (II of 1882). **H**

32. When any decree or order shall have been made by the High Court, whether before or after the passing of this Act, directing the sale of any immoveable property for any purpose whatever, every person holding such property, or entitled to a contingent right therein, being a party to the suit or proceeding in which such decree or order shall have been made, and bound thereby, or being otherwise bound by such decree or order, shall be deemed so to hold or be entitled (as the case may be) upon a trust within the meaning of this Act ¹.

Holding immoveable property, the sale of which has been ordered by High Court.

In every such case, it shall be lawful for the High Court, if the said Court shall think it expedient for the purpose of carrying such sale into effect, to make an order vesting such property or any part thereof, for such estate as the Court shall think fit, either in any purchaser or in such other person as the Court shall direct.

Order for vesting estate in lieu of conveyance by party to suit in order to carry out sale.

Every such order shall have the same effect as if the person so holding or entitled had been free from all disability, and had duly executed all proper conveyances and assignments of such property for such estate

Effect of order.

(Note).

*I.--"Shall be...this Act."***Trustees for sale.**

As to liabilities and disabilities, &c. of ———— See notes on Ss. 4, 11, 22, 37 to 39, 52 and 53 of Indian Trusts Act (II of 1883). 1

33. Where any decree or order shall be made by the High Court for the specific performance of a contract concerning any immoveable property, or for the partition or exchange of any immoveable property, or generally when any decree shall be made for the conveyance of any immoveable property, either in cases arising out of the doctrine of election or otherwise, it shall be lawful for the said Court to declare that any of the parties to the said suit, wherein such decree is made are trustees of such property, or any part thereof, within the meaning of this Act, or to declare concerning the interests of unborn persons who might claim under any party to the said suit, or under the will or voluntary settlement of any person deceased who was during his lifetime a party to the contract or transactions concerning which such decree is made, that such interests of unborn persons are the interests of persons who, upon coming into existence, would be trustees within the meaning of this Act.

Thereupon it shall be lawful for the High Court to make such order or orders as to the estates, rights, and interests of such persons, born or unborn, as the said Court might, under the provisions of this Act, make concerning the estates, rights, and interests of trustees born or unborn.

34. It shall be lawful for the High Court to make declarations and give directions concerning the manner in which the right to any stock, Government securities, or thing in action vested under the provisions of this Act shall be exercised, and thereupon the person or persons in whom such right shall be vested shall be compellable to obey such directions and declarations by the same process as that by which other orders under this Act are enforced.

35. In all cases in which it shall be expedient to appoint a new trustee or new trustees, and it shall be found inexpedient, difficult, or impracticable so to do without the assistance of the High Court, it shall be lawful for the said Court to make an order appointing a new trustee or new trustees, whether there be any existing trustee or trustees or not at the time of making such order, and if there be such trustee or trustees, either in substitution for, or in addition to, him or them.

The person or persons who, upon the making of such order, shall be trustee or trustees shall have the same rights and powers as he or they would have had if appointed by decree in a suit duly instituted.

Powers of new trustees 2.

(Notes).

General.

Nature and source of section.

(a) The Act (XXVII of 1866) S. 35 is analogous to the English statute 13 & 14, Victoria Chapter 60 : The terms of the section are almost identical with the terms of S. 32 of the English Act. 6 N.W.P. 54 (56). J

(b) In cases to which English Law is applicable, Courts in India although they may not be bound to accept the rulings of the highest Courts in England, cannot but regard such rulings as important authorities. (*Ibid.*) K

1.—“Power to Court to make order appointing new trustees.”

(1) **Appointment of new trustees—Rules.**

See notes on Ss. 60, 73 and 74 of the Indian Trusts Act.

L

(2) **Application for removal of trustee—Grounds therefor—Institution of suit.**

(a) Where an application was made to the High Court, under S. 35 of Act XXVII of 1866 for removal of certain trustees under a will on the grounds *inter alia* of non-payment of legacies, misappropriation, waste and breach of trust, it was held that matters mentioned above are much too grave to be disposed of on a mere application. 6 N.W.P. 54 (56). M

(b) Where, in such cases, there is also opposition for the appointment of new trustees, the applicant should be referred to a regular suit. (*Ibid.*) N

(c) The Court of Chancery in England has considered the scope and effect of the corresponding section in the English Act and has held that the Court cannot under that section remove a trustee who is willing to act, and that if there be ground for removing a trustee for misconduct or other causes, the application to Court should be by bill. (*Ibid.*) O

2.—“Powers of new trustees.”

See notes on Ss. 73 and 75 of the Indian Trusts Act (II of 1882).

P

36. It shall be lawful for the High Court, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order to direct that any immoveable property subject to the trust shall^{*} vest in the person or persons who, upon the appointment, shall be the trustee or trustees, for such estate as the Court shall direct¹.

Power to Court to vest immoveable property in new trustee.

Such order shall have the same effect as if the person or persons, who, before such order, was or were the trustee or trustees (if any), had duly executed all proper conveyances of such property for such estate.

1.—“ That any immoveable property... for such estate shall direct.”

Vesting of trust property in new trustees.

See notes on S. 75 of the Indian Trusts Act (Act II of 1882).

Q

37. It shall be lawful for the High Court, upon making any order for appointing a new trustee or new trustees, either by the same or by any subsequent order, to vest the right to call for a transfer of any stock or Government securities subject to the trust, or to receive the dividends, interest, or income thereof, or to sue for or recover any thing in action subject to the trust, or any interest in respect thereof, in the person or persons who, upon the appointment, shall be the trustee or trustees.

Power to Court to vest right to sue in new trustees 1.

1.—“ Power to Court to vest right to sue in new trustees.”

See notes on S. 75 of the Indian Trusts Act (II of 1882)

R

38. Any such appointment by the High Court of new trustees, and any such conveyance or transfer as aforesaid, shall operate no further or otherwise as a discharge to any former or continuing trustee, than an appointment of new trustees under any power for that purpose contained in any instrument would have done.

Old trustees not discharged from liability 1.

1.—“ Old trustees not discharged from liability.”

See notes on sec Ss. 73 and 75 of the Indian Trusts Act (II of 1882).

S

39. An order under any of the hereinbefore contained provisions, for the appointment of a new trustee or new trustees, or concerning any immoveable property, stock, or Government securities, or thing in action subject to a trust, may be made upon the application of any person, ¹ beneficially interested in such immoveable property, stock, Government securities, or thing in action, whether under disability or not, or upon the application of any person duly appointed as a trustee thereof; and an order under any of the provisions hereinbefore contained, concerning any immoveable property, stock, Government securities, or thing in action subject to a mortgage, may be made on the application of any person beneficially interested in the equity of redemption, whether under disability or not, or of any person interested in the monies secured by such mortgage.

Who may apply.

1.—“An order...for appointment of new trustee, may be made upon the application of any person.”

(1) Application for new trustees.

See notes on S. 74 of the Indian Trusts Act, (II of 1882).

(2) Trustees for partnership business—Close of partnership business and sale thereof by new trustee appointed—Deed of transfer by new trustee to vendee.

On the closing of a partnership business subject to a trust, the shareholders appointed A a new trustee to sell the business, who accordingly sold it to B. In the meanwhile, the old trustees had left the country. Where an application with consent of all parties, was put in that A might sign the deed of conveyance to B, it was held that it was necessary to show that the old trustees had no lien on any other property in the business before the order asked for could be made. In the matter of *Port Gloucester Mills Co., v. Bonstee*, O.C. 260.

40. When any person shall deem himself entitled to an order under any of the provisions hereinbefore contained, it shall be lawful for him to present a petition to the High Court for such order as he may deem himself entitled to, and he may give evidence by affidavit or otherwise in support of such petition before the said Court, and may serve such person or persons with notice of such petition as he may deem entitled to service thereof.

1.—“Application may be by petition.”

(Note).

See Notes on S. 74 of the Indian Trusts Act (II of 1882).

41. Upon the hearing of any such petition, it shall be lawful for the said High Court, should it be deemed necessary, to direct a reference to one of the Judges of the Court to inquire into any facts which require such an investigation, or it shall be lawful for the said Court to direct such petition to stand over, to enable the petitioner to adduce evidence or further evidence before the Court, or to enable notice or any further notice of such petition to be served upon any person or persons.

42. Upon the hearing of any such petition, it shall be lawful for the High Court to dismiss such petition with or without costs, or to make an order thereupon in conformity with the provisions of this Act.

43. Whensoever in any cause or matter, either by the evidence adduced therein, or by the admissions of the parties, or by report of one of the Judges of the Court, the facts necessary for an order under this Act shall appear to the High Court to be sufficiently proved, it shall be lawful for the said

Court, either upon the hearing of the said cause or of any petition or application in the said cause or matter, to make such order under this Act.

44. Whenever any order shall be made under this Act by the High Court for the purpose of conveying any immoveable property, or for the purpose of releasing or disposing of any contingent right, and such order shall be founded on an allegation of the personal incapacity of a trustee or mortgagee or an allegation that a trustee or the heir or devisee of a mortgagee is out of the jurisdiction of the High Court, or cannot be found, or that it is uncertain which of several trustees, or which of several devisees of a mortgagee, was the survivor, or whether the last trustee, or the heir, or last surviving devisee of a mortgagee, be living or dead, or on an allegation that any trustee or mortgagee has died intestate without an heir, or has died, and it is not known who is his heir or devisee, then in any of such cases the facts that the High Court has made an order upon such an allegation shall be conclusive evidence of the matter so alleged in any Court of Civil Judicature upon any question as to the legal validity of the order :

Provided always that nothing herein contained shall prevent the High Court directing a re-conveyance of any immoveable property conveyed or assigned by any order under this Act, or a re-disposition of any contingent right conveyed or disposed of by such order ; and it shall be lawful for the said Court to direct any of the parties to any suit concerning such property or contingent right, to pay any costs occasioned by the order under this Act, when the same shall appear to have been improperly obtained.

45. It shall be lawful for the High Court to exercise the powers herein conferred for the purpose of vesting any immoveable property, stock, Government securities, or thing in action, in the trustee or trustees of any charity or society, over which charity or society the High Court would have jurisdiction upon suit duly instituted, whether such trustee or trustees shall have been duly appointed by any power contained in any deed or instrument, or by the decree of the said Court, or by order made upon a petition to the said Court.

46. Where any minor or person of unsound mind shall be entitled to any money payable in discharge of any immoveable property, stock, Government securities, or thing in action conveyed or transferred under this Act, it shall be lawful for the person by whom such money is payable to pay the same into the High Court, in trust in any cause then

Orders by High Court founded on certain allegations conclusive evidence of matter contained therein.

Powers as to re-conveyance of immoveable property, &c.

Money of minors and persons of unsound mind to be paid into Court.

depending concerning such money, or, if there shall be no such cause, to the credit of such minor or person of unsound mind, subject to the order or disposition of the said Court ;

and it shall be lawful for the said Court, upon petition in a summary way, to order any money so paid to be invested in Government securities, and to order payment or distribution thereof, or payment of the dividends or interest thereof, as to the said Court shall seem reasonable.

47. Where, in any suit commenced or to be commenced in the High Court, it shall be made to appear to the Court that diligent search and enquiry have been made, after any person made a defendant, who is only a trustee, to serve him with the process of the Court, and that he cannot be found, it shall be lawful for the said Court to hear and determine such cause, and to make such absolute decree therein against every person who shall appear to it to be only a trustee, and not otherwise concerned in interest in the matter in question, in such and the same manner as if such trustee had been duly served with the process of the Court, and had appeared at the hearing of such cause :

Decree not effective without service of process. Provided always that no such decree shall bind, affect, or in any wise prejudice any person against whom the same shall be made, without service of process upon him as aforesaid, his heirs, executors, or administrators for or in respect of any estate, right, or interest which such person shall have at the time of making such decree for his own use or benefit, or otherwise than as a trustee as aforesaid.

Orders under Act chargeable with same stamp-duty as deeds of conveyance. 48. Every order to be made under this Act, which shall have the effect of a conveyance of any immoveable property, or a transfer of any such stock, Government securities, or thing in action as can only be transferred by stamped deed, or for the transfer of which a stamp is necessary, shall be chargeable with the like amount of stamp-duty as it would have been chargeable with if it had been a deed executed, or a transfer made, by the person or persons holding such property or entitled to such stock, Government securities, or thing in action.

Every such order shall be duly stamped for denoting the payment of the said duty.

Costs may be paid out of estate. 49. The High Court may order the costs and expenses of and relating to petitions, orders, directions, conveyances, and transfers to be made in pursuance of this Act, or any of them, to be paid and raised out of or from the immoveable or moveable property, or the rents or produce thereof, in respect of which the same respectively shall be made, or in such manner as the said Court shall think proper.

50. Upon any petition being presented under this Act to the High Court concerning a person of unsound mind, it shall be lawful for the said Court to make an order directing an enquiry whether such person is or is not of unsound mind, and incapable of managing himself and his affairs.

Power to order enquiry concerning person of unsound mind.

Such order shall have the same effect as the like order made under section 1 of Act XXXIV of 1858 (*to regulate proceeding in Lunacy in the Courts of Judicature established by Royal Charter*), and the enquiry directed to be made shall be made in all respects in the manner declared and prescribed for making enquiry under the last mentioned Act.

Effect of order.

Postponement of order pending enquiry.

The High Court may postpone making any order upon the petition presented as aforesaid, until any enquiry so directed to be made shall have been finally concluded.

51. Upon any petition under this Act being presented to the High Court, it shall be lawful for the said Court to postpone making any order upon such petition, until the right of the petitioner shall have been declared in a suit duly instituted for that purpose.

Suit may be directed.

52. Every order made or purporting to be made under this Act by the High Court shall be a complete indemnity to all persons whatsoever for any act done pursuant thereto ; and it shall not be necessary for such persons to enquire concerning the propriety of such order, or whether the High Court has jurisdiction to make the same.

Indemnity to persons obeying orders under Act.

53. Any order made by the High Court under this Act shall have the same effect, and be executed in the same manner, as a decree.

Execution and effect of orders.

54. This Act may be cited as " The Indian Trustee Act, 1866. "

Short title.

INDEX.

A

Alienability, of rights of entry—English Law, *T*, 13.

Annuity, *B—D*, 8.

What is—, *B*, 8.

Common instance of—, *C*, 8.

an incorporeal hereditament, *D*, 8.

Assurance, Modes of assurances—English Law, *Z—D*, 13, 14.

Formalities for various assurances, *E*, 14.

Tenant-in-tail, *F—I*, 14.

Contingent, right, as applied to immoveable property, *L—N*, 12

Meaning of—, *L*, *M*, 12.

right, nature of, *N*, 12.

interest, *O—Q*, 12.

Conveyance, under English Law, *E—G*, 9.

Formalities necessary for conveyance by deed—English Law, *H—N*, 9.

“and convey”, when used, *V*, 13.

Several modes of—or assurance under English Law, *W*, 13.

Ancient mode of—, *X*, *Y*, 13.

Corporal, hereditament, meaning of, *E—G*, 6

hereditaments, how conveyed, *H*, 6.

Court, Supreme Courts in India, establishment of Administration of law in India, *W—Y*, 16.

Court's power to appoint person to convey property on behalf of persons out of jurisdiction and other disabilities, *D*, *E*, 23

D

Deed, transferability by—, *E—G*, 9.

Transferability by—accompanied by other formalities, *H—N*, 9.

Descent, rules or canons of—English Law, *Q*, 15.

Canons of—seven in number, *R*, 15.

Devises, Executory—. Possible, not actual events considered, *R*, *S*, 13.

E

Entry, Provision for right of—, *U*, 13.

Estate, Scope and meaning of the term, *W*, 8.

Estates only in realty—No estates in personality—English Law, *X*, *Y*, 8.

—, *U—A*, 8.

Vested—, *O—V*, 9, 10.

Estate—(Concluded).

Vested—distinguished from "estate in possession"—English Law, *Q*, 10.

Nature of, *R*, 10.

Definition of, *S*, *T*, 10.

Examples of, *U*, *V*, 10.

Life—Definition, *W*, 10.

two kinds, *X*, 10.

Life—Examples of, *Y*—*Z*, 11.

Vested life-estate, example of, *A*, 11.

Estates of greater description than estate for life—English Law, *B*, *C*, 11.

Estates of less description than a life—Examples, *D*—*G*, 11.

in possession, definition of. Example, *H*, *I*, 12.

in expectancy, definition of—Example, *J*, *K*, 12.

tail, nature of—English Law, *F*, 13.

tail, how created, *G*, 13.

Divisions and sub-divisions of—tail, *H*, 13.

H

Heir, Conception of the term—English Law, *O*, 15.

apparent, distinguished from heir presumptive, *P*, 15.

Definition of, 20.

Hereditament, *V*—*D*, 5, 6.

meaning of the word—English Law *V*—*X*, 5

Chattels annexed to land are included in, *Y*—*Z*, 6

Chattels annexed to land—Examples, *A*—*D*, 6

Corporeal, *E*—*H*, 6

Classification of hereditaments into corporeal and incorporeal under English Law
—Criticism of Austin, *I*, 7.

Incorporeal, *I*—*O*, 6, 7.

meaning of the word, *I*, 6.

hereditaments—Examples, *J*—*N*, 7.

hereditaments, how conveyed, *O*, 7.

Immoveable, Scope of the expression, *L*, 4.

Analogous expression in English Law, *M*, 4.

Interest, *U*—*A*, 8.

meaning of—English Law, *U*, 8.

Common meaning of, *V*, 8.

Executory, nature of—English Law, *O*—*Q*, 12.

M

Mortgage, definition of, *S*, 15.

Moveable, Scope of expression, *L*, 4.

Notes, Marginal, nature and use of, *I*, 2.

INDEX.

P

Preamble, A—H, **1, 2.**

of an Act Importance, *A*, **1.**

Nature of, *D—D*, **1.**

Use of, *E, F*, **1.**

Object of, *G*, **1.**

Effect of, *H*, **2.**

Property, Immovable, *J—P*, **4, 5.**

Immovable, definition, *J, K*, **4.**

Meaning of expression, *N*, **4.**

Moveable and immovable—distinction between—English Law, *O, P*, **4, 5.**

T

Tenant-in-tail, after possibility of issue extinct—disposition by, how effected, *J*, **14.**

Tenement, *Q—U*, **5.**

Meaning of the word—English Law, *Q—T*, **5.**

Use of the word—in “assurance,” *U*, **5.**

Tenure, *R—T*, **7, 8.**

Conception of—the foundation of the English Law of property, *R, S*, **7, 8.**

Meaning of the expression, *T*, **8.**

Trust, Definition of, *L*, **15.**

Implied and constructive trustees, definition of, *U, V*, **15.**

in Hindu and English Law—How Courts give effect to them, *Z—B*, **16.**

Hindu—Powers of High Court under the Indian Trustee Act, *C*, **17.**

for payment of debts, *H*, **27.**

property, vesting of, in new trustees, **30**

Trustees, trustees for sale, *G*, **28.**

Appointment of new trustees—Courts Powers, *J—L*, **29.**

Appointing new trustees—Rules, *L*, **29.**

Application for removal of—Grounds therefor—Institution of suit, *T—Z*, **29.**

Powers of new trustees, **29.**

Power to Court to vest right to sue in new, **30.**

Old—not discharged from liability by appointment of new, **30.**

Application for new, **31.**

Trustees for partnership business—Close of partnership business and sale thereof by new trustee appointed—Deed of transfer by new trustee to vendee, **31.**

V

Vest, Meaning of, *O, P*, **9, 10.**

W

Women, Disposition by married woman—Acts, etc., to be performed for validating the transfer, *K*, **14.**

THE LAWYER'S COMPANION SERIES.

THE
TRUSTEES' AND MORTGAGEES'
POWERS ACT.

(ACT XXVIII OF 1866).

(WITH THE CASE-LAW THEREON)

BY
T. V. SANJIVA ROW,
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AND
THE "INDIAN EVIDENCE ACT")

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NAMES OF CASES NOTED IN THIS ACT

English Cases.

	PAGE
Allanay v. Wagstaff, 4 H and N 307	2
Ainslie <i>Re</i> , 30 Ch D 485	6
A G v. Tomline, 5 Ch D 750	2
Back v. Rebow, 1 P Wms 94 .. .	10
Botting v. Martin, 1 Camp 318	24
Buckland v. Butterfield, 2 Brod and Bing 54	10
—— v. ———, 22 R R 649	10
Burlinson v. Hall, 12 Q B D 350	11
Casborne v. Scarfe, 1 A T K 603	5
Cooper v. Woolfit, 2 M and N 126	8
Dowlatram v. Gulabchand, (1885) B P J 151	8
Elwes v. Mawe, 2 Sm L C 7th (Ed) 185, 3 East 38	9
Evans v. Roberts, 5 B and C 832	8
—— v. ———, 29 R R 421	8
Graves v. Weld, 5 B and A D 117 (119)	8
Hallen v. Render, 1 C M and R 276	9
Harlakenden's case, 4 Rep 63 (b)	7
Harvey v. Harvey, 2 Stra 1141	11
Lawson v. Lawson, 3 Atk 13	10
Llewellyn <i>Re</i> , 37 Ch D 324	6
Marshall v. Green, 1 C P C 35 (44) .. .	7,9
Parker v. Taswell, 2 De G and J 559	24
Peneton v. Robert, 2 East 88	10
Quincey, <i>Ex parte</i> , 1 Atk 477	10,11
Rex v. Hedges, 2 East (P C) 590 .. .	10
—— v. St Dunstan, 1 B and C 686 .. .	11
Rodwill v. Phillips, 9 M and W 505	8
Saunders v. Delagoa Co., 23 Q B D 239	11
Smith v. Surman, 9 B and C 561 .. .	8
Wake v. Hall, 7 Q B D 295	10
——v. ——, 8 A C 195	9,10
Wiltshire v. Cottrell, 1 E and B 674	11

Indian Cases.

I. L. R. Allahabad Series.

Khub Chand v. Kalian Das, 1 A 240	
Musammat Bhawani Kuar and others v. Gulub Rai, 1 A 348...	
Ram Baran Ram v. Salig Ram Singh, 2 A 896	
Debi Prasad v. Jofar Ali, 3 A 40	
Gaya Prasad v. Salik Prasad, 3 A 682	
Har Prasad v. Bhagwandas, 4 A 196	
Jiwan Ali Beg v. Basa Mal, 9 A 108 (F B)	
Churaman v. Balli, 9 A 591	6
Krishan Lal v. Ganga Ram, 13 A 28	11
Abdul Majid v. Muhammad Faizullah, 13 A 89	4, 5

NAMES OF CASES.

	PAGE
Karimunnissa v. Phul Chand, 15 A 134	4
Kansalia v. Gulab Kuar, 21 A 297	7
Harbans Lal v. The Maharaja of Benares, 23 A 126	6
Dhandai Bibi v. Abdur Rahman, 23 A 209	3
Janki v. Shoodhar, 23 A 211	7
Muhammad Sadiq v. Laute Ram, 23 A 291 (F B).	6
Iqbal Husen v. Nand Kishore, 24 A 294	6

I. L. R. Bombay Series.

Gopal Narayan v. Trimbak Sadashiv, 1 B 267	5
Mulchand Kuber v. Lalce Trikam, 6 B 404	5
Samuel Marie Breton <i>In re the goods of</i> , 7 B 381 (385)	33
Hurjiwan virji v. Jamsetji Nowroji, 9 B 64	4
Nagar Timpa v. Bhaskar Parmaya, 10 B 444	4
Lakshminbai <i>In re</i> , 12 B 638 (644)	34
Motiram v. Vital, 13 B 100	11
Narayan Jagannath Dikshit v. Vasudeo Vishnu Dikshit, 15 B 247	6
Nurbibi v. Magan Lal Parbhudas, 16 B 547	6
Shri Dhundiraj Ganesh Dev v. Ganesh, 18 B 730	5
Bhikaji Bai v. Pandu, 19 B 43	6

I. L. R. Calcutta Series.

Baldev Dhanrup Marvadi v. Rarichandra Balvant Kulkarni, 19 B 121	4
Parashram Harlal v. Govind Ganesh Porgamkar, 21 B 226	4, 5
Vishnu Ganesh Joshi v. Yeshavanta Rao, 21 B 387	4
Natha Kerra v. Dhunbaiji, 23 B 1	3
Keshav v. Vinayak, 23 B 22	3
Tarvadi Bholanath Harishanker v. Bai Kashi, 26 B 305	4
Parbutty Nath Roy Chowdhry v. Mudho Paroe, 3 C 276	6
Hurmuzi Begum v. Hirdaynaram, 5 C 921	6
Srnath Dutt v. Gopal Chundra Mittra, 9 C 511	4
Peru Bepari v. Rune Maifarash, 11 C 164	11
Delundra Kumar Mandel v. Rup Lal Dass, 12 C 546	4
Umes Chunder Sircar v. Zahur Fatima, 18 C 164 (P C)	5
Ram Gopal Bysack v. Nurumuddin, 20 C 446	6
Boni Pershad v. Parbati Koer, 20 C 895	4
Kanti Ram v. Kutubuddin Mahomed, 22 C 33	5
Nafar Chandra Pal Chowdhuri v. Ram Lal Pal, 22 C 742	7
Gous Mahomed v. Khawas Alikhan, 23 C 450	4
Shibu Halder v. Gupi Sundari Dasgupta, 24 C 449	6

I. L. R. Madras Series.

Ananthathirtha Chariar v. Nagamuthu Ambala Garen, 4 M 203	5
Gangadhara v. Sivarama, 8 M 246	5
Appasami v. Scott, 9 M 5	4
Sami Ayyar v. Krishnasami, 10 M 169	4
Reference under section 39 of Act V of 1882, 12 M 203 (F B)...	7
Ramalinga v. Samiappa, 13 M 15	6
Krishna v. Akilanguda, 13 M 54	5
Queen Empress v. Shaik Ibrahim, 13 M 518	11
Purushottama v. Municipal Council of Bellary, 14 M 467	11
Rutna Mudaliar v. Tiruvenkata Chariar, 22 M 351	6

Bombay Law Reporter.

Tarvadi Bholanath Harishankar v. Bai Kashi, 4 Bom L R 18 (S C)	4
----------------------------------------------------------------	---

Printed Judgments, Bombay.

Dowlattram v Ghulabchand, 1885 B P J 151	7
------------------------------------------	---

Calcutta Weekly Notes.

Baij Nath Lohea v. Binoyendara Nath Plait, 5 C W N CCVIII	4
—v. Binoyendra Nath Plait, 6 C W N 5	4

Central Provinces Law Reports.

Murtazakhan Malgazar v. Gairaj Singh Rajput, 14 C P L R 89	8
------------------------------------------------------------	---

N. W. P. High Court Reports.

Mussumat v. Ram Narain Singh, 1 N W P H C R 213	7
Faqueer Soonar v Musumat Khuderun, 2 N W P H C R 251	6
Buddoo Mull v. Maharoop, 6 N W P H C R 129...	4

Moore's Indian Appeal

Sambhoolal Girdhurlall v. The Collector of Surat, 8 M I A 1	3
-------------------------------------------------------------	---

THE TRUSTEES' AND MORTGAGEES' POWERS ACT.

ACT XXVIII OF 1866.

RECEIVED THE G.-G.'S ASSENT ON THE 24TH OCTOBER 1866

An Act to give Trustees, Mortgagees, and others, in cases to which English Law is applicable, certain powers now commonly inserted in Settlements, Mortgages, and Wills, and to amend the Law of property, and relieve Trustees.

Preamble WHEREAS it is expedient that, in cases to which English law is applicable, certain powers and provisions usually inserted in settlements, mortgages, wills, and other instruments, should be made incident to the estates of the persons interested ¹, so as to dispense with the necessity of inserting the same in terms in every such instrument, and that in such cases trustees should be relieved, It is enacted as follows.—

(Note).

1.—“ *Estates of the persons interested.* ”

Estates in English Law—Their creation—“ Words of Limitation ” necessary for their creation.

See S. 2 of the Indian Trustee Act (XXVII of 1866).

A

Interpretation-
clause.

1. In the construction of this Act, unless there be something repugnant in the subject or context,—

“ Immoveable property ” shall include land ¹, any benefit to arise out of land ², and things attached to the earth or permanently fastened to anything which is attached to the earth ³.

“ Mortgage ” shall be taken to include every instrument by virtue whereof immoveable property is in any manner conveyed, pledged, or charged as security for the repayment of money or money's worth lent, and to be reconveyed or released on satisfaction of the debt ⁴.

“ Mortgagor ” shall be taken to include every person ⁵ by whom any such conveyance ⁶, pledge, or charge ⁷ as aforesaid shall be made :

"Mortgagee" shall be taken to include every person to whom or in whose favour any such conveyance, plodge, or charge as aforesaid is made or transferred ⁸ : and

"High Court" means any Court established or to be established under Statute 24 and 25 Vic., cap. 104, and includes the Chief Court of the Panjab.

(Notes).

I.—"Immoveable property....land."

N. B.—See notes on S. 2 of the Indian Trustee Act (XXVII of 1866).

(1) Definition of immoveable property.

The definition of—, given in the section is taken from the General Clauses Act, S. 3 (Act X of 1897). **B**

(2) Land—Significance of the word—English Law.

(a) The popular sense of the word "land" is not so extensive as its legal meaning, which includes not only the mere surface soil, but all above and below it. Goodeve R. P. p. 9 (4th Ed.) **C**

(b) By the grant of the land or ground itself all that is *supra*, as, houses, trees, and the like, is granted; and also all that is *infra*, as, mines, earth, clay, quarries, and the like. Shep. T. 90. **D**

(c) A structure on the land, as a house, or trees growing out of it, are legally included under the term "land," and so is everything lying beneath its surface, as ores, fossils, mines, etc. *Allaway v. Wagstaff*, 4 H. and N. 307; *A. (t. v. Tomline*, 5 Ch. D. 750. **E**

(d) (i) Where land is covered by water and where the owner of the land makes a grant thereof to another, the grant cannot pass a right to the water, for "there is no property in water." 2 Bl. 18. **F**

(ii) "Water is a moveable wandering thing, and must of necessity continue common by the law of nature, so that one can only have a temporary transient usufructuary property therein, wherefore, if a body of water runs out of one's pond into another man's, he has no right to reclaim it, but the land which that water covers is permanent, fixed, and immoveable, and, therefore, in this he may have a certain substantial property of which the law will take notice and not of the other. 2 Bl. 18. See, also, Co. Litt. 4 a and 4 b. **G**

(e) But a grant of the land carries with it all rights in respect of the use of the water, subject to such rights, if any, as are vested in third persons. While a grant of water, without the land covered by it, passes a right of fishery only. 4 Cruise Dig., p. 268. **H**

(3) Extensive meaning of the word "land" sometimes cut down by context.

(a) Where "land" is spoken of in plain contradistinction to houses, it will not be taken to comprise other things. So, mines lying under a piece of land may be excepted out of a conveyance of such "land." Shep. T. 94. **I**

1.—“Immoveable property...land”—(Included).

- (b) On the other hand, under a gift or grant of a “house,” or, of a “messuage,” land commonly occupied with it will not pass unless immediately annexed to and enjoyed with the house, as outbuildings, orchard, garden, and curtilage (or courtyard). (*Ibid.*) **J**

(4) Purchase of land by Railway Companies—what passes under the purchase.

Where a Railway Company purchases land under the Railways Clauses Consolidation Act, the Company is not entitled to the minerals unless expressly purchased, and minerals are deemed to be excepted out of the conveyance unless expressly named and conveyed. 8 and 9 Vic. C. 20, S. 77. **K**

(5) Significance of the word “land” under statutes.**(a) UNDER CONVEYANCING AND LAW OF PROPERTY ACT 1881.**

Under—, unless a contrary intention appears, the word “land” includes land of any tenure, and tenements and hereditaments, corporeal or incorporeal, and houses and other buildings. 44 and 45 Vic. C. 41, S. 2. **L**

(b) UNDER ACTS PASSED AFTER THE YEAR 1850.

In every act passed after the year 1850, the expression “land” shall, unless the contrary intention appears, include messuages, tenements, and hereditaments, houses and buildings, of any tenure. Interpretation Act 52 & 53 Vic. C. 63, S. 3. **M**

2.—“Any benefit to arise out of land.”**(1) Scope of the expression “land” under English Law.**

Under the English Law, the expression “land” includes all that would be “real property” and possibly many things which are in the nature of benefits or rights arising out of land, such rights being termed “incorporeal rights”. 13 B.L.R. 254 (P. C.) **N**

(2) *Toda giras hak*, included in the conception of immoveable property.

Toda giras hak, which is a right to receive an annual payment, and which attaches to the inamdar into whose hands the village may pass, is an interest in immoveable property and as such it is a benefit which arises out of land. 8 M.L.A. 1, 23 A. 209. N. W. P. H. C. R. (1867) 63 (F.B.) **O**

(3) *Haq-i-chaharum*, an incident attaching to land.

Similarly—, or liability to pay customary dues is an incident attaching to land and where the land is alienated, it can be enforced against the vendee unless it is limited to right available only as against the vendor. 13 B.L.R. 254 (P.C.) **P**

(4) Allowances charged on immoveable property.

Annual—, are included within the definition of immoveable property. 23 B. 22. **Q**

(5) Hereditary offices—Hindu Law.

Under the Hindu Law, hereditary offices are considered to be immoveable property. 9 B.H.C.R. 99; 13 B.L.R. 254 (P.C.) **R**

(6) Interest of “widow” in immoveable property—Hindu Law.

Under the Hindu law, the life interest of a Hindu widow in the income of her husband's immoveable property is construed as immoveable. 23 B. 1. **S**

2.—“ Any benefit to arise out of land ”—(Continued).**(7) Hat, a benefit arising out of land.**

(a) A *hat* is—and as such it is included in the notion of immoveable property. 22 C. 752. **T**

(b) So, a lease of a *hat* must be made as provided in S. 107 of the Transfer of Property Act (IV of 1882). (*Ibid.*) **U**

(8) Other examples of benefits, construed as immoveable property.

Rights of common, rights of way, and other profits in *alieno solo*, rents, pensions, and annuities secured upon land would fall within the term “immoveable property.” Gour’s Tr. Pro. Act, p. 97, Vol. I. **Y**

(9) Claim to maintenance, if included in the notion of immoveable property.

A claim to maintenance, if charged on the family property of the person against whom it is claimed, is a species of property 21 B. 387. **W**

(10) Debt secured by a mortgage of immoveable property—Nature of—Divergent views of High Courts.**(a) BOMBAY HIGH COURT.**

In cases decided under the Code of Civil Procedure (Act XIV of 1882), a debt secured by a mortgage of immoveable property has been regarded as moveable property, because it is a “ debt not secured by a negotiable instrument ” within the meaning of S. 268 of the Code. 10 B. 444 ; 19 B. 121 ; 21 B. 226 ; 4 Bom. L. R. 18 (S C.) ; 26 B. 305 , 9 B. 64. **X**

(b) CALCUTTA HIGH COURT.

(i) In one case the High Court observed thus :—“ A mortgage is not a mere debt, it represents a substantial interest in the mortgaged property viz., the right of selling it under certain conditions in realization of the debt ”. In this case, it was held that such a debt fell into the category of immoveable property. 9 C. 511. **Y**

(ii) But the High Court held *contra* in the following subsequent cases :—12 C 546 , 20 C. 895 , 23 C. 450 , 5 C.W.N. 100 ; 6 C. W. N. 5. **Z**

(c) MADRAS HIGH COURT.

The view of the Madras High Court is similar to the earlier view taken by the Calcutta High Court. Their Lordships of the Madras High Court observed “ regarded as a debt, it is undoubtedly moveable property, but seeing that a debt is made a charge on land, we cannot say that it is not a benefit to arise out of land ” within the meaning of the General Clauses Act (X of 1897), and we are constrained to hold that it is immoveable property. 9 M. 5. following 9 C. 511 ; 6 N.W.P. 11 C.R. 129 ; 1 A. 348 , 9. B.H. C. R. 64 , 10 M. 169. **A**

N.B.—But see 18 M. 497.

(d) ALLAHABAD HIGH COURT.

View similar to that of the Calcutta High Court taken in the later cases prevails in Allahabad. That is, a debt secured by a mortgage of immoveable property, has been held to be, in its nature, a moveable property. 13 A. 89 ; 15 A. 134. **B**

2.—“Any benefit to arise out of land”—(Continued).**11) Mortgage decree, if included in the conception of immoveable property.**

(a) A mortgage decree is not included in the term “immoveable property.”
9 A. 108 (F.B.). **C**

(b) So, it was held that, since a mortgage decree does not *in itself* purport or operate to create any right, title or interest, in immoveable property an assignment thereof by one person to another need not be registered under the Registration Act. 13 A. 89; 23 C. 450, dissenting from 1 B. 267. **D**

(12) Mortgaged property—Equity of redemption, if construed as immoveable property.

(a) EQUITY OF REDEMPTION, NATURE OF—ENGLISH LAW.

(i) At Common Law, a mortgagor was bound to repay the mortgage money to the mortgagee on the appointed day mentioned in the instrument of mortgage. Under the Common Law the mortgagor had no legal right to redeem except upon payment on the day named in the “proviso for redemption,” and if default was made in payment on that day, the estate was considered to belong to the mortgagee absolutely. See Goodeve pp. 196, 197, 200 and 201 (1897). **E**

(ii) This stringent rule of the Common Law was mitigated by equity, for was considered that the enforcement of such a rule worked a serious hardship on the mortgagor, because equity said that the mortgagee had possession of the mortgaged property, merely as a security for the money lent and for nothing more. So, since the time of James I in England, the rule was established that, although the mortgagor makes default in payment of the money advanced to him on the appointed day mentioned in the “proviso for redemption, he has a right to pay the money to his creditor (mortgagee), provided he comes within a *reasonable time* after default is made.” This right of the mortgagor, is called “the equity of redemption,” because it was only through the instrumentality of equity, that he had got the right. See pp. 201 and 202, Goodeve’s R.P. (1897)

(b) EQUITY OF REDEMPTION IS IMMOVEABLE PROPERTY. **F**

(i) The “equity of redemption” in mortgaged property is considered as immoveable property. *Casborne v. Scarfe*, 1 Atk. 603

(ii) An “equity of redemption” has always been considered as an estate in the land, for it may be devised, granted or entailed with remainders, and such entail and remainders may be barred by fine and recovery, and therefore cannot be considered as a mere right only, but such an estate whereof there may be a “seisin.” The person, therefore entitled to the “equity of redemption” is considered as the owner of the land. *Per Hardwick L.C. in Casborne v. Scarfe*, 1 Atk. 603; see, also, 18 B. 730, 21 B. 226, 22 C. 333; 18 C. 164 (P.C.); 1 A. 240; 8 A. 705, 4 M. 203; 8 M. 246. **G**

(N.B.)—But see 3 A. 682; 4 A. 196; 6 B. 404; A W.N. (1885) 155.

(13) The following have been held to be included in the conception of immoveable property.

(a) A claim to an easement. 24 W.R. 300.

(b) A right of ferry. 13 M. 54.

2.—“Any benefit to arise out of land”—(Concluded).

- (c) A right of fishery. 3 C. 276, 20 C. 446; 24 C. 449.
 - (d) A right to open a water-course. 4 W.R. 107.
 - (e) A right to hold land rent-free. 11 B.H.C.R. 1; 3 A. 40.
 - (f) A right for *malikana*. 5 C. 921, 9 A. 591.
 - (g) A right to possession and management of *saranjam*. 15 B. 247. **H to J**
- (14) **The following have been excluded from the category of immoveable property.**
- (a) a right to customary dues of an hereditary office. 22 M. 351.
 - (b) a right of a purchaser to have lands registered in his name. 19 B. 43. **K**

3.—“Things attached . . . anything which is attached to the earth.”

(1) Meaning of the expression “attached to the earth.”

* The expression—, means

- (a) rooted in the earth, as in the case of trees and shrubs;
- (b) imbedded in the earth, as in the case of walls or buildings; and
- (c) attached to what is so imbedded for the permanent beneficial enjoyment of that to which it is attached. See S. 3 of Act IV of 1882. **L**

(2) General rule in respect of things attached to the earth.

As a rule, what is affixed to the soil, becomes, in the contemplation of law a part of it, and is subjected to the same rights of property as the soil itself. Gour's Transfer of Property Act Vol I, p. 42. **M**

(3) Trees and shrubs, if immoveable property.

- (a) As trees and shrubs are rooted in the earth, they are considered to be attached thereto, and so long as they are so attached, they are construed as immoveable property and form part of the soil to which they are affixed. 23 A. 291 (**F.B.**), 23 A. 126, 13 M. 15. **N**
- (b) **But** they lose their character immediately on severance. *Re Anslie*, 30 Ch. D. 485, *Re Llewellyn*, 37 Ch. D. 324. **O**
- (c) So long as such trees and shrubs are not cut, they are *prima facie* to be taken as passing with the land on which they are grown. 2 N.W.P.H.C.R. 251. **P**
- (d) So, where a certain house (with its compound) was sold it was held that the conveyance comprised the trees growing in the compound at the time, unless they were expressly excepted. (*Ibid.*) 24 A. 294. **P1**
- (e) Where a *mutwalli* of a shrine planted fruit trees on land, which admittedly belonged to the tribe, and where a creditor of the *mutwalli* having obtained a money decree against him sought to attach the trees in execution thereof it was held that, (i) although the predecessor of the judgment-debtor planted the trees while acting as *mutwalli*, he could not acquire any property in the trees in so doing apart from the land (ii) that, although the *mutwalli* who originally planted the grove, and his successors might have derived some benefit by taking the fruits of the trees, they could not acquire any right of ownership in the trees as against the shrine and (iii) that consequently, such trees, until the contrary is established, belonged to the shrine to which the land belonged. 16 B. 547. **Q**

3.—“Things attached....anything which is attached to the earth”

—(Continued.)

(f) Similarly where a tenant plants trees on his holding, he cannot acquire any right to sell or otherwise dispose of them at any rate beyond the term of his own tenancy. 10 A. 159, 21 A. 297, 23 A. 211, 22 C. 742. **R**

(g) Where a tenant holding land for a term only hypothecates trees standing thereon, the benefit of the hypothecation would enure to the encumbrancer only for the term of the tenancy and would cease to be enforceable with the cessation of the tenancy and tenant's ejectionment. 3 A. 567
2 A. 896; 1 N. W. P. H. C. R. 213. **S**

(4) Things attached to the earth—Conveyance, effect of.

(a) Trees and shrubs being attached to the soil pass by a conveyance without any express mention. Willis, P. P. (15th Ed.) 133. **T**

(b) *But*, if under the conveyance they are reserved and excepted, the law considers them to have been severed from the soil on which they grow, and they would then cease to be immoveable property. *Harlakenden's case*, 4 Rep. 63 (b). **U**

(c) Where, under a *yaddast*, a grant was made to A “to cut and enjoy the trees, etc., and the grass, kora, green nuts, from this day till the close of Fash 1304,” it was held that what was granted was not a mere lease of existing things but also, of what might grow on the ground within the period named, that is, of an interest in immoveable property, inasmuch as it was contemplated that the vendee should derive a benefit from the further growth of the thing sold, from further vegetation and from the nutriment to be afforded by the land. *Marshall v. Green* 1 C. P. C. 35. **Y**

(d) Where a document creates a right of use over growing trees for a term of years, it was held that the effect of the document was to create an interest in land, and not only in the forest produce which it purports to lease. 12 M. 203. (F.B.). **W**

(5) “Emblements” under English Law, if things attached to the earth.

(a) EMBLEMENTS, WHAT ARE.

The term “emblements” is used to designate the growing crops cultivated by the labor, and at the cost of the tenant in possession, which are treated in law for many purposes as moveable chattels, and as the personal property of the tenant, because his intention in cultivating them is to increase his personal estate rather than to benefit the heir or successor to the land. Leake Us. and Prof. p. 44. **X**

(b) WHAT ARE INCLUDED IN EMBLEMENTS.

(i) The class of things thus designated includes the annual crops of corn and grain, hemp and flax, hops, potatoes, turnips and the like, clover and artificial grasses. (*Ibid.*)

(ii) Emblements or the annual crops comprise not only corn and gram sown, but also roots planted and other annual artificial products of the land. *Dowlatab v. Gulabchand*, (1885) B.P.J, 151. **Y & Z**

3.—“ Things attached....anything which is attached to the earth”

—(Continued).

(c) THINGS EXCLUDED.

(i) The expression does not include growing grass which is the natural and permanent produce of the land renewed from time to time without cultivation. *Co. Litt* 55b, *Erans v. Roberts*, 5 B. and C. 832. **A**

(ii) Nor does it include timber or other trees, whether mature or immature, the growing fruit of trees and the growing crops of apples and pears are also excluded from the term (*Ibid.*) And see, *Rodwill v. Phillips*, 9 M. and W. 505. **B**

(iii) The expression does not comprise fruit trees, such as palm-trees and figs, which pass with the land. *Dowlston v. Gulabchand*, (1885) B.P.J. 151. **C**

(d) SIGNIFICANCE OF THE TERM AS USED IN LAW.

The term, as used in law, means only the present annual crop and not the future crops of cultivated products which bear annual crops for several successive years, as of clover and artificial grasses (*Graves v. Weld*, 5 B. and Ad. 119. **D**

(e) EMBLEMENTS, NATURE OF—ITS DEVOLUTION - REASONS.

(i) “Emblements” or growing crops unlike growing trees and other permanent growths, devolve on the personal representatives, and not on the heir of a deceased owner of the inheritance who dies before they are reaped. (*Goodove* p. 23 (1897). **E**

(ii) The reason for the emblements devolving on the demise of the owner to his personal representatives is that they are mainly the result of the expenditure of the owner's personal estate. *Cooper v. Woolfit*, 2 H. & N. 126. **F**

(iii) The principle is that the tenant should be encouraged to cultivate, by being sure of receiving the fruits of his labor. The tenant is entitled to such products only as grow by the industry and manurance of man and to one crop only of those products, and the crop must be of a species which ordinarily repays the labor by which it is produced within the year in which that labour is bestowed. *Graves v. Weld*, 5 B. and Ad. 117. **G**

(iv) Where a tenant for life sows the land, but dies before harvest, his executors have a right to the crop as a return to the tenant for his outlay. (*Goodove* p. 40 (1897). **H**

(f) EMBLEMENTS, NOT IMMOVEABLE PROPERTY.

(i) The products known as “emblements” are not considered as part of immoveable property. *Graves v. Weld*, 5 B. and Ad. 105. **I**

(ii) But, on the other hand they belong to the tenant who has grown them, and which he is allowed to gather and take away even on ejectment. 14 C.P.D. R. 89 following *Evans v. Roberts*, 29 R. R. 421. **J**

(b) Sale of crops trees, in a growing state -Nature of interest conveyed.

(a) In a sale of crops or trees or other things existing in a growing state in the land, the question whether the interest conveyed to the vendee is or is not an interest in land depends upon the nature of the agreement between the parties and the rights which such an agreement may give. *Smith v. Surman*, 9 B. and C. 561. **K**

3.—“ Things attached . . . anything which is attached to the earth ”—

(Continued).

(b) The sole test in such cases is that of intention which should be gathered from the terms of the conveyance. *Marshall v. Green*, L. R. 1 C.P.D. 35 (44). **L**

(c) Where the vendee is not to derive any benefit from the soil, but is only to remove, as soon as possible, so much timber as happened to be affixed to the land at the time of the conveyance, it cannot be said that the intention of the parties to the contract was to convey any interest in the land to the vendee. *Gour*, p. 45 (1904) Vol. I. **M**

(d) But where the subject of the conveyance is a young plantation of some rapidly-growing timber which was not to be cut down until it had become substantially changed and derived benefit from the land, it was held that the intention of the parties to the conveyance was to vest in the vendee an interest in the immoveable property. *Marshall v. Green*, L.R. 1 C.P.D. 35. **N**

(7) If things imbedded in the earth are things attached thereto, and as such immoveable property

It is a well-known legal maxim that “all that is built on the soil follows, or belongs to, the soil.” So houses and other erections on the land belong to the owner of the land on which they are built. See *Elwes v. Mawe*, 2 Sm. L.C. 7th (Ed.) 185, 3 East. 38. **O**

(8) Erections put up on land by trespasser—To whom such erections belong.**(a) A MERE TRESPASSER:**

If the person putting up the erections is a mere trespasser, then they will be considered to be accretions to the land. *Gour*, p. 45 (Vol. I). **P**

(b) INNOCENT TRESPASSER.

But, where a trespasser builds innocently, or under the belief that the owner would compensate him for it, although the owner is entitled to the improvements on the land (they being things imbedded in the earth), the person who made the improvements is entitled to get compensation from the owner. See S. 51 of Act IV of 1882. **Q**

(9) Machinery, planted in the earth, if immoveable property.

Besides the erections imbedded in the earth, other fixtures such as machinery, and the buildings accessory thereto, are also to be considered as immoveable property. *Per Lord Fitzgerald in Wake v. Hall*, 8 A.G. 195. **R**

(10) Trade fixtures, nature of—Whether they are immoveable property or not.**(a) FIXTURES, DEFINITION OF.**

(i) The term “fixtures” has the peculiar meaning of personal chattels which have been annexed to the freehold, but which are removable at the will of the person who has annexed them. *Hallen v. Render*, 1 C.M. and R. 276. **S**

(ii) Anything annexed or affixed to any building (and not merely laid upon or brought into contact with the building) was, under the Common Law in England, treated as an addition to the property of the owner of the inheritance in the soil and was termed a “fixture.” *Goodeve* p. 24 (1897). **T**

3.—“ Things attached....anything which is attached to the earth ”

—(Continued).

(b) GENERAL RULE.

- (i) The general rule in respect of buildings and trade fixtures is that, whatever has been annexed to the land for the purpose of its better enjoyment, the intention must clearly be presumed to be to annex the erections to the property in the land. *Wake v. Hall*, 8 A.C. 195. **U**
- (ii) But, where the nature of the annexation is such as to show that the intention was to annex them only temporarily, then they may be detached and removed from the corpus. *Wake v. Hall*, 7 Q.B.D. 295. **Y**
- (iii) With regard to the permanent fixtures the law is that they must be deemed to be added to the principal from which they may not be removed. *Buckland v. Butterfield*, 2 Brod. and Bing. 54. **W**

(c) EXCEPTIONS.

- (i) The increasing cost and importance of trade fixtures have led to the incorporation of several exceptions to this general rule. So where a lease of a certain land was made to A, for a certain number of years and he makes on the land a furnace fixed with mortar for his advantage, it was held that he was entitled to remove them after the expiration of the lease. (Year Book. 20, Hen VII. 13, A and B, Poole's Case Salk 368). **X**
- (ii) Similarly a dyer who makes his vats or vessels, has been held to be entitled to remove them. (*Ibid.*) **Y**
- N.B.**—But, if either allows them to be fixed to the earth after the term, then they belong to the lessor. (*Ibid.*)
- (iii) Where a fire engine is erected to work a colliery, or a cyder mill to make cyder, it was held that the machineries were accessories to the carrying on of the trade. *Lawson v. Lawson*, 3 Atk. 13, *Lord Dudley v. Lord Ward Ambler*, 113. **Y1**
- (iv) Matters of ornament, as ornamental marble chimney-pieces, pier glasses, hangings, wainscot fixed only by screws, have been considered to be chattels of a personal nature and as such to belong to the outgoing tenant. *Beck v. Rebour*, 1 P. Wms. 94, *Eaparte Quincey*, 1 Atk. 477. **Z**
- (v) Gardeners and nurserymen erecting green-houses or hot-houses have been held to be entitled to disannex the structures. *Peneton v. Robert*, 2 East 88. **A**

(11) Whether things attached to imbedded things can be said to be 'attached to earth.'

(a) WHEN SUCH THINGS ARE NOT IMMOVEABLE PROPERTY :—EXAMPLES.

- (i) Such things if not attached for the permanent beneficial enjoyment of that to which they are annexed are excluded from the category of immoveable property. Gour p. 47 (Vol. i), 1904.
- (ii) Window blinds. *Amos and P.* 110, 326, 371, Wood L and T. (16th Ed.) 670.
- (iii) Window sashes. *Rex v. Hedges*, 2 East (P.C.) 590.
- (iv) Shutters, fastenings, hangings, tapestry and pier glasses, whether nailed or not. *Buckland v. Butterfield*, 22 R. R. 649.

**3.—“ Things attached.....anything which is attached to the earth ”—
(Concluded).**

- (v) Beds fastened to the walls or ceilings. *Ex-parte Quincey*, 1 Atl. 477.
 - (vi) Fixed tables, water-tubes, cup-boards, book cases screwed to the walls. *Rex v. St. Dunstan*, 4 B. and C. 686.
 - (vii) Clock-cases, iron ovens, grates, ranges and stoves, although fixed in brick work, iron back to chimneys. *Harvey v. Harvey*, 2 Stra. 1141.
 - (viii) Things placed in juxtaposition to each other, cannot be said to be “attached to earth,” (*c.g*) a granary erected on straddles is not “attached to land.” *Wiltshire v. Cotwell*, 1 E. and B. 674.
- (b) WHEN SUCH THINGS ARE IMMOVEABLE PROPERTY.
- (i) They are considered to be immoveable property when they are permanently attached to houses and are necessary for their permanent beneficial enjoyment. Gour p. 47 (Vol. I), 1904.
 - (ii) Doors, windows, shutters of a building, when permanently attached thereto. 11 C. 164 ; 13 M. 518 ; 14 M. 467. **B & C**

4.—“ Mortgage shall.....debt.”

Mortgage, definition of.

See S. 58 of Act IV of 1882.

D

5.—“ Mortgagor... person.”

Mortgagor, definition of.

See S. 58 of Act IV of 1882.

E

6.—“ Conveyance.”

**Conveyance, definition of—Various forms of conveyance under English Law—
Formalities requisite for such conveyance—What passes under such conveyance.**

See notes on S. 2 of the Indian Trustee Act (XXVII of 1866).

F

7.—“ Charge.”

(1) Charge, definition of.

See S. 100 of Act IV of 1882.

G

(2) Charge distinguished from mortgage.

- (a) A mortgage imports the transfer of an interest in immoveable property, while a charge holder has not such an interest. He is entitled to have his claim satisfied out of particular property but that property is not transferred to him. It is only in virtue of the decree for sale that an interest passes to the person entitled. *Sancred v. Delagoa Bay Co.*, 23 Q.B.D. 239. *Burlinson v. Hall*, 12 Q.B.D. 350 ; 13 B. 100 ; 13 A. 28. **H**

- (b) A mortgage is created only by act of parties while a charge may be created either by act of parties or operation of law. See Ss. 58 and 100 of Act IV of 1882. **I**

- (c) A charge should be enforced within 3 years, but the period for enforcing a mortgage is 12 years. See p. 325 of Act IV of 1882 (Shepperd and Brown's Commentaries). **J**

3.—“Mortgagee....transferred.”

Mortgage, definition of.

See S. 58 of Act IV of 1882.

K

Powers of Trustees for Sale, &c., and Trustees of renewable Leaseholds.

2. In all cases where, by any will, deed, or other instrument of settlement, it is expressly declared that trustees or other persons therein named or indicated shall have a power of sale¹, either generally or in any particular event, over any immoveable property named or referred to in, or from time to time subject to the uses or trusts of, such will, deed, or other instrument, it shall be lawful for such trustees or other persons, whether such property be vested in them or not, to exercise such power of sale by selling such property either together or in lots, and either by public auction or private contract, and either at one time or at several times².

Trustees empowered to sell may sell in lots, and either by public auction or private contract.

(Notes).

1.—“It is expressly...power of sale.”

Trustees for sale—Their disabilities.

See notes on Ss. 4, 52 and 53 of the Indian Trusts Act (II of 1882).

L

2.—“By selling such....times.”

Sale of trust property in lots—Trustee’s power in respect of.

See notes on S. 37 of the Indian Trusts Act (II of 1882).

M

3. It shall be lawful for the persons making any such sale to insert any such special or other stipulations,¹ either as to title or evidence of title, or otherwise, in any conditions of sale, or contract for sale, as they shall think fit; and also to buy in the property or any part thereof at any sale by auction, and to rescind or vary any contract for sale and to re-sell the property which shall be so bought in, or as to which the contract shall be so rescinded, without being responsible for any loss which may be occasioned thereby².

Sale may be made under special conditions, and trustees may buy in, &c.

and no purchaser under any such sale shall be bound to enquire whether the persons making the same may or may not have in contemplation any particular re-investment of the purchase-money in the purchase of any other property or otherwise.

(Notes).

1.—“It shall be....stipulations.”

Power of trustee to sell under special conditions.

See notes on S. 38 of the Indian Trusts Act (II of 1882).

N

2.—“Also to buy in...occasioned thereby.”

Power of trustees to buy in and re-sell.

See notes on S. 39 of the Indian Trusts Act (II of 1882.)

0

Trustees exercising power of sale, &c, empowered to convey. 4. For the purpose of completing any such sale as aforesaid, the persons empowered to sell as aforesaid shall have full power to convey or otherwise dispose of the property in question in such manner as may be necessary.¹

(Notes).

1.—“For the.....necessary.”

Trustees for sale—Power to convey.

See S. 39 of the Indian Trusts Act (II of 1882), and notes thereunder

P

Money arising from sales to be laid out in manner indicated in will, &c. 5. The money so received upon any such sale as aforesaid shall be laid out in the manner indicated in that behalf in the will, deed, or instrument containing the power of sale ;

and, until the money to be received upon any sale as aforesaid shall be so disposed of, the same shall be invested at interest in Government securities¹ for the benefit of such persons as would be entitled to the benefit of the money, and the interest and profits thereof, in case such money were then actually laid out as aforesaid :

Until so laid out, money to be invested in Government securities. Provided that, if the will, deed, or instrument shall contain no such indication, the persons empowered to sell as aforesaid shall invest the money so received upon any such sale in their names upon Government securities in India, and the interest of such securities shall be paid and applied to such person or persons for such purposes and in such manner as the rents and profits of the property sold as aforesaid, would have been payable or applicable in case such sale had not been made.

(Notes).

1.—“The same...securities.”

(1) Investment of trust monies—Securities for such investment.

See S. 20 of the Indian Trusts Act (II of 1882) and notes thereto.

Q

(2) Power of trustees to vary investments.

See S. 40 of the Indian Trusts Act (II of 1882) and notes thereto.

R

Powers of Mortgagee.

6. Where any principal-money is secured or charged by deed on any immoveable property,¹ or on any interest² therein, the person to whom such money shall for the time being be payable, his executors, administrators, and assigns, shall, at any time after the expiration of one year from the time when such principal-money shall have become payable, according to the terms of the deed, or after any interest on such principal money shall have been in arrear for six months, or after any omission to pay any premium on any insurance which by the terms of the deed ought to be paid by the person entitled to the property subject to the charge, have the following powers to the same extent (but no more) as if they had been in terms conferred by the person creating the charge, namely :—

1st, a power to sell, or concur with any other person in selling, the whole or any part of the property by public auction or private contract subject to any reasonable conditions he may think fit to make and to rescind or vary contracts for sale, or buy in and resell the property, from time to time, in like manner :

2nd, a power to appoint or obtain the appointment of a receiver of the rents and profits of the whole or any part of the property in manner herein-after mentioned.

(Notes).*1.—“Where any . . . property.”***(1) Charge, what is.**

See notes on S. 1, *supra*.

S

(2) Distinction between charge and mortgage.

See notes on S. 1, *supra*.

T

2.—“Interest.”

“Interest” synonymous with “estate” under English Law—Various “estates” under English Law—How they are created—Nature of such estates—How such estates are conveyed.

See notes on S. 2 of the Indian Trustee Act (XXVII of 1866).

U

7. Receipts for purchase-money given by the person or persons exercising the power of sale hereby conferred shall be sufficient discharges to the purchasers, who shall not be bound to see to the application of such purchase-money.

Receipts for purchase-money sufficient discharges¹.

(Notes).

General.

Section analogous to S. 42 of the Indian Trusts Act.

See S. 42 of Act II of 1882.

Y

1.—“ Receipts....discharges.”

See notes on S. 42 of the Indian Trusts Act (II of 1882).

W

8. No such sale as last aforesaid shall be made until after six months' notice in writing given to the person or one of the persons entitled to the property subject to the charge or affixed on some conspicuous part of such property ;

Notice to be given before sale ;

but, when a sale has been effected in professed exercise of the powers hereby conferred, the title of the purchaser shall not be liable to be impeached on the ground that no case had arisen to authorize the exercise of such power, or that no such notice as aforesaid had been given ,

but purchaser relieved from inquiry as to circumstances of sale.

but any person damnified by any such unauthorized exercise of such power shall have his remedy in damages against the person or persons selling.

9. The money arising by any sale effected as aforesaid shall be applied by the person receiving the same as follows :--

Application of purchase-money.

first, in payment of all the expenses incident to the sale or incurred in any attempted sale ;

secondly, in discharge of all interest and costs then due in respect of the charge in consequence whereof the sale was made, and

thirdly, in discharge of all the principal-moneys then due in respect of such charge ;

and the residue of such money shall be paid to the person entitled to the property subject to the charge, his executors, administrators, or assigns, as the case may be.

10. The person exercising the power of sale hereby conferred shall have power by deed to convey or assign to and vest in the purchaser the property sold, for all the estate and interest therein ¹ which the person who created the charge had power to dispose of :—

Conveyance to purchaser.

Provided that nothing herein contained shall be construed to authorize the mortgagee of a term of years to sell and convey the fee simple of the property comprised therein in cases where the mortgagor could have disposed of such fee simple at the date of the mortgage ² .

(Notes).

1.—“For all the estate and interest therein.”

Estates” under English Law—Their creation—Nature of such estates.

See notes on S. 2 of the Indian Trustee Act (XXVII of 1866).

X

2.—“Convey the fee simple....mortgage.”

Estates in “fee simple” under English Law—“Words of limitation” necessary for their creation: How they are conveyed.

See notes on S. 2 of the Indian Trustee Act (XXVII of 1866).

Y

11. At any time after the power of sale hereby conferred shall have become exerciseable, the person entitled to exercise the same shall be entitled to demand and recover from the person entitled to the property subject to the charge, all the deeds and documents in his possession or power relating to the same property, or to the title thereto, which he would have been entitled to demand and recover if the same property had been conveyed, appointed, or so ordered to and were then vested in him for all the estate and interest which the person creating the charge had power to dispose of ;

Owner of charge may “call for title-deeds and conveyance of legal estate”.

and where the legal estate shall be outstanding in a trustee, the person entitled to a charge created by a person equitably entitled, or any purchaser from such person, shall be entitled to call for a conveyance of the legal estate to the same extent as the person creating the charge could have called for such a conveyance if the charge had not been made.

(Notes)

1.- “Owner of....legal estate.”

Charge, definition of—Charge distinguished from mortgage.

See notes on S. 1, *supra*.

Z

12. Any person entitled to appoint or obtain the appointment of a receiver as aforesaid may from time to time, if any person or persons has or have been named in the deed of charge for that purpose, appoint such person or any one of such persons to be receiver, or if no person be so named, then may, by writing delivered to the person or any one of the persons entitled to the property subject to the charge, or affixed on some conspicuous part of the property, require such last-mentioned person or persons to appoint a fit and proper person as receiver, and if no such appointment be made within ten days after such requisition, then may in writing appoint any person he may think fit.

Appointment of receiver.

No person shall be ineligible for the office of receiver merely because he is an officer of the High Court.

13. Every receiver appointed as aforesaid shall be deemed to be the agent of the person entitled to the property subject to the charge, who shall be solely responsible for his acts or defaults, unless otherwise provided for in the charge.

Receiver deemed agent of mortgagor.

14. Every receiver appointed as aforesaid shall have power to demand and recover and give effectual receipts for all the rents, issues, and profits of the property of which he is appointed receiver, by suit, distress, or otherwise, in the name either of the person entitled to the property subject to the charge, or of the person entitled to the money secured by the charge, to the full extent of the estate or interest which the person who created the charge had power to dispose of¹.

Powers of receiver.

(Notes).

1.—“ To the full ...dispose of ”

(1) **Estates under English Law—Their nature, creation and how they are conveyed.**

See full notes in respect thereto, under S. 2 of the Indian Trustee Act (XXVII of 1866). **A**

(2) **Charge, nature of—Charge distinguished from mortgage** **A 1**

See notes on S. 1, *supra*.

15. Every receiver appointed as aforesaid may be removed by the like authority, or on the like requisition as before provided with respect to the original appointment of a receiver, and new receivers may be appointed from time to time.

Receiver may be removed, and new receivers appointed.

16. Every receiver appointed as aforesaid shall be entitled to retain out of any money received by him, in lieu of all costs, charges, and expenses whatsoever, such a commission, not exceeding five *per centum* on the gross amount of all money received, as shall be specified in his appointment, and if no amount shall be so specified, then five *per centum* on such gross amount.

Receiver to receive commission not exceeding five per cent.

17. Every receiver appointed as aforesaid shall, if so directed in writing by the person entitled to the money secured by the charge¹, insure and keep insured from loss or damage by fire out of the money received by him the whole or any part of the property included in the charge which is in its nature insurable.

Receiver to insure if required.

1.—“ Money secured by the charge ”

Charge, definition of—How it differs from “ mortgage.”

See notes on S. 1, *supra*.

18. Every receiver appointed as aforesaid shall pay and apply all the money received by him in the first place in discharge of Government revenue, and of all taxes, rates, and assessments whatsoever, and in payment of his commission as aforesaid, and of the premiums on the insurances, if any, and in the next place in payment of all the interest accruing due in respect of any principal-money then charged on the property over which he is receiver, or on any part thereof; and, subject as aforesaid, shall pay all the residue of such money to the person for the time being entitled to the property subject to the charge, his executors, administrators, or assigns.

Application of
moneys received by
him.

19. The powers and provisions contained in sections 6 to 18 of this Act, both inclusive, relate only to mortgages or charges made to secure money advanced or to be advanced by way of loan, or to secure an existing or future debt.

This Part to re-
late to charges by
way of mortgage
only.

Leases.

20. Where any license¹ to do any act which, without such license, would create a forfeiture, or give a right to re-enter, under a condition or power reserved in any lease² heretofore granted, or to be hereafter granted, shall, at any time after this Act comes into operation, be given to any lessee or his assigns, every such license shall, unless otherwise expressed extend only to the permission actually given, or to any specific breach of any proviso or covenant made or to be made, or to the actual assignment, under-lease or other matter thereby specifically authorized to be done, but not so as to prevent any proceeding for any subsequent breach (unless otherwise specified in such license);

Restriction on
effect of license to
alien.

and all rights under covenants and powers of forfeiture and re-entry in the lease contained shall remain in full force, and shall be available as against any subsequent breach of covenant or condition, assignment, under-lease, or other matter not specifically authorized or made dispensable by such license, in the same manner as if no such license had been given; and the condition or right of re-entry shall be and remain in all respects as if such license had not been given, except in respect of the particular matter authorized to be done.

(Note).

1.—“License.”

License, definition of.

Where one person grants to another, or to a definite number of other persons, a right to do, or continue to do, in or upon the immovable property of the grantor, something which would, in the absence of such right, be unlawful, and such right does not amount to an easement or an interest in the property, the right is called a “license.”

See S. 52 of the Indian Easements Act (V of 1882.)

C

2.—“Which, without such license...lease.”

Forfeiture of leases by lessee—Ways by which forfeiture takes place.

See S. 111 of the Transfer of Property Act (IV of 1882).

D

21. Where in any lease heretofore granted or to be hereafter granted there is or shall be a power or condition of re-entry on assigning or under-letting, or doing any other specified act without license, and a license at any time after the passing of this Act shall be given to one of several lessees or co-owners to assign or under-let his share or interest, or to do any other act prohibited to be done without license, or shall be given to any lessee or owner, or any one of several lessees or owners, to assign or under-let part only of the property, or to do any other such act as aforesaid in respect of part only of such property, such license shall not operate to destroy or extinguish the right of re-entry in case of any breach of the covenant or condition by the co-lessee or co-lessees, or owner or owners, of the other shares or interests in the property, or by the lessee or owner of the rest of the property (as the case may be) over or in respect of such shares or interests or remaining property, but such right of re-entry shall remain in full force over or in respect of the shares or interests or property not the subject for such license.

Restricted operation of partial licenses.

22. Where the reversion upon a lease is reserved, ¹ and the rent or other reservation is legally apportioned, the assignee of each part of the reversion shall, in respect of the apportioned rent or other reservation allotted or belonging to him, have and be entitled to the benefit of all conditions or powers of re-entry for non-payment of the original rent or other reservation, in like manner as if such conditions or powers had been reserved to him as incident to his part of the reversion in respect of the apportioned rent or other reservation allotted or belonging to him.

Apportionment of conditions of re-entry in certain cases.

(Notes).

1.—“Where the reversion....reserved.”

(1) Reversion, what is—English Law.

A reversion is where the residue of the estate does always continue in him that made the particular estate, or where the particular estate is derived out of his estate. Co. Litt. 22b. E

(2) Reversion—examples of —

(a) Where A, an owner of an estate in fee-simple, grants an estate for life to B, B's estate is called a “particular estate”, and that part of A's estate in fee-simple which is left in him and which will not take effect in possession till the determination of B's estate is called a “reversion.” (Goodeve's Law of Property, p. 228 (1897). F

(b) Similarly if a termor creates by sub-lease out of his own term, a term smaller than his own term, and the sub-lessee perfects his sub-lease by entry, the interest which remains in the termor in right of his superior term is called a reversion. (*Ibid.*) G

(3) Reversion, nature of.

A—under English Law, is an “estate in expectancy” or a “future estate.” For the person entitled to a “reversion” has only a vested interest which takes effect in possession at a future time only, i.e., after the estate, on which the reversion is expectant, falls to the ground. Goodeve's R.P. p. 227, 228 (1897). H

Rent-charges.

23. The release from a rent-charge of part of the immoveable property charged therewith ¹ shall not extinguish the whole rent-charge, but shall operate only to bar the right to recover any part of the rent-charge out of the property released, without prejudice, nevertheless, to the rights of all persons interested in the property remaining unreleased and not concurring in or confirming the release.

Release of part of land charged, not an extinguishment.

(Note).

1.—“The release from....therewith.”

See notes on S. 2 of the Indian Trustee Act (XXVII of 1866). I

Powers.

24. A deed hereafter executed in the presence of and attested by two or more witnesses in the manner in which deeds are ordinarily executed and attested shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by deed or by any instrument in writing not testamentary, notwithstanding it shall have been expressly required that a deed or instrument in writing made in exercise of such power should be executed or attested with some additional or other form of execution or attestation or solemnity:

Mode of execution of powers ¹.

Provided always that this provision shall not operate to defeat any direction in the instrument creating the power, that the consent of any particular person shall be necessary to a valid execution, or that any act shall be performed in order to give validity to any appointment, having no relation to the mode of executing and attesting the instrument.

and nothing herein contained shall prevent the donee of a power from executing it conformably to the power by writing or otherwise than by an instrument executed and attested as an ordinary deed, and to any such execution of a power this provision shall not extend.

(Notes).

“Mode of execution of powers”

(1) “Power” distinguished from “estate”—English Law.

An estate in land is equivalent to the ownership of the land either for what is practically an absolute interest, as in the case of an estate in fee-simple, or for some limited interest, as in the case of an estate for life or in tail. A power exercisable with respect to land is an authority to dispose of some interest in the land. Goodeve R.P. 298 (1897). J

(2) Certain expressions explained with respect to “powers”

(a) DONEE.

The person to whom the power is given is called the “donee” of the power. (Goodeve p. 298 (1897) K

(b) APPOINTOR.

The ‘donee’ of the ‘power’ when he exercises it is called the ‘appointor’. (*Ibid.*) L

(c) “APPOINTEE.”

The person in whose favour the power is exercised is called the ‘appointee’ (*Ibid.*) M

(3) Powers, general and special.

A power may be either “general” or “special” Under a “general” power, the “donee” may appoint to any person including himself, under a “special” power an appointment can be made only for the purposes and to the persons or class of persons specified by the donor of the power. Goodeve R.P. (1897) p. 298. N

(4) Division of “powers”—English Law.

(a) Powers under Common Law.

(b) Powers under Statute of Uses.

(c) Statutory Powers.

(d) Equitable Powers.

See pp. 299, 300 Goodeve R.P. (1897.) O

25. Where, by any will which shall come into operation after the passing of this Act, the testator shall have charged his immoveable property, or any specific portion thereof, with the payment of his debts ¹, or with the payment of any legacy or other specific sum of money, and shall have bequeathed the property so charged to any trustee

Legatee in trust may raise money by sale, notwithstanding want of express power in will.

or trustees for the whole of his estate or interest therein², and shall not have made any express provision for the raising of such debt, legacy, or sum of money out of such property, it shall be lawful for the said legatee or legatees in trust, notwithstanding any trusts actually declared by the testator, to raise such debts, legacy, or money as aforesaid by sale and absolute disposition by public auction or private contract, of the said property or any part thereof, or by a mortgage of the same, or partly in one mode and partly in the other,

and any deed or deeds of mortgage so executed may reserve such rate of interest and fix such period or periods of repayment as the person or persons executing the same shall think proper.

(Notes).

1.—“*The testator . . . payment of his debts.*”

Trust for payment of debts—How such debts are paid—Powers of such trustees.

See notes on Ss. 11 & 43 of the Indian Trusts Act (II of 1882).

P

2.—“*Whole of his estate or interest therein.*”

“Estates” under English Law—Their creation—“Words of limitation” necessary for their creation—How such estates are conveyed.

See notes on S. 2 of the Indian Trustee Act (XXVII of 1866.)

Q

26. The powers conferred by the last preceding section shall extend to all and every person or persons in whom the property bequeathed in trust shall for the time being be vested by survivorship, or under the laws relating to intestate or testamentary succession, or to any person or persons who may be appointed under any power in the will, or by the High Court, to succeed to the trusteeship vested in such legatee or legatees in trust as aforesaid.

Powers given by last section extended to survivors, legatees, &c.

27. If any testator who shall have created such a charge as is described in section 25 of this Act shall not have bequeathed the property charged as aforesaid in such terms as that his whole estate and interest¹ therein shall become vested in any trustee or trustees, the executor or executors (if any) for the time being named in such will shall have the same or the like power of raising the said moneys as is hereinbefore vested in the legatee or legatees in trust of the said property, and such power shall from time to time devolve on, and become vested in, the person or persons (if any) in whom the executorship shall for the time being be vested.

Executors to have power of raising money, &c., where no sufficient bequest.

(Notes).

1.—“ Whole estate or interest.”

See notes of S. 2 of the Indian Trustee Act (XXVII of 1866). **R**

28. Purchasers or mortgagees shall not be bound to enquire whether the powers conferred by sections 25, 26, and 27 of this Act, or any of them, shall have been duly and correctly exercised by the person or persons acting in virtue thereof.

Purchasers, &c.
not bound to enquire
as to powers.

Inheritance.

29. In cases of intestacies occurring before the first day of January 1866, where there shall be a total failure of heirs of the purchaser, or where any immoveable property shall be descendible as if an ancestor had been the purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the property shall descend, and the descent shall thenceforth be traced, from the person last entitled to the property as if he had been the purchaser thereof ².

Descent how traced 1.

This section shall be read as part of Act No. XXX. of 1839 (*for the amendment of the law of inheritance*).

(Notes).

1.—“ Descent how traced.”

(1) Tracing of descent under English Law.

- (a) Before the year 1833 in England, descent was to be traced from the ‘purchaser,’ i.e., the person who last acquired the land otherwise than by descent. Inheritance Act (3 & 4 William IV. C. 106), 1833. **S**
- (b) Considerable difficulty was experienced in finding out the real “purchaser” for the purpose of tracing the descent. It was practically found that how far so ever high in the genealogical tree, a person tried to find out the real “purchase,” he did not succeed in tracing him. In order to obviate this difficulty, the Inheritance Act of 1833 provided that “In every case of tracing descent, the person who is found to be last entitled to the land shall be considered to be the “purchaser”, unless the contrary is proved, i.e., unless it is shown that he has acquired the land by descent.” (*Ibid.*) **T**

(2) Devises to “heir”—English Law.

- (a) By the Common Law of England, where a man devised land to his heir, the heir was considered to have taken the land by descent and not as devisee. (Goodeve p. 145 R.P. (1897). **U**
- (b) But, the Inheritance Act (1833) provided that the heir shall be considered to have taken the land as devisee, i.e., as “purchaser.” (*Ibid.*) **Y**

(3) Limitation to heirs of settlor—English Law.

- (a) Where by any assurance (other than a will) land was limited to the person or to heirs of the person who thereby conveyed the same land, such person acquired no new estate. (*Ibid.*) **W**

1.—“*Descent how traced*”—(Concluded).

- (b) But, the Inheritance Act (1833) provided that, in the case of assurances executed after the year 1833, the person to whom or to whose heirs the land is limited shall be considered to have acquired the same as “purchaser.” Inheritance Act (3 and 4 Will. IV. C. 106), 1833. **X**

2.—“*Where there shall—thereof*”

(1) Failure of heirs of the purchaser—English Law.

Where there shall be a total failure of heirs of the purchaser, or where any land shall be descendible as if an ancestor had been the “purchaser” and there shall be a total failure of the heirs of such ancestor, the land shall descend as if the person last entitled had been the “purchaser.” Law of Property Amendment Act 1859 (22 and 23 Vic. C. 35. S. 19). **Y**

(2) Canons of descent under English Law—Changes made by the Inheritance Act (1883).

See pp. 144—150, Goodeve R.P. (1897) **Z**

Assignment of Moveables and Terms for years.

30. Any person shall have power to assign moveable property now by law assignable, terms for years of immoveable property ¹, and estates by *elegit* ², directly to himself and another person or other persons or corporation, by the like means as he might assign the same to another.

(Notes).

1.—“*Terms for years of immoveable property.*”

(1) Estate for years under English Law—definition of.

An estate for years is a contract for the possession of lands or tenements for some determinate period, and it takes place where a man lets them to another for the term of a certain number of years, agreed upon between the lessor and the lessee, and the lessee enters thereon. Co. Litt. 13 b. **A**

(2) Assignment of “terms for years”—English Law.

(a) The Statute of Frauds provided that no leases should be assigned or surrendered unless by deed or note, in writing, signed by the party assigning or surrendering the same or his agents thereunto lawfully authorised by writing. *Bottiny v. Martin*, 1 Camp. 318. **B**

(i) By the Real Property Act (1845) any lease required by law to be in writing of any tenements or hereditaments, and an assignment of a “chattel-interest,” not being copyhold, in any tenements or hereditaments are to be void at law unless made by deed. 8 and 9 Vic. C. 106, S. 3. **C**

(ii) But though an instrument be void as a lease, as not being by deed, it may be good as an agreement, and where possession has been given, the tenant will hold under the same terms, as if a lease had been granted. *Parker v. Taswell*, 2 De. G. and J. 559. **D**

(b) The leases which are excepted from the Statute of Frauds, are not required by law to be in writing, and therefore need not be made by deed: but all assignments of leases must be by deed. Goodeve R.P. (152) 1897. **E**

2.—“*Estates by elegit.*”

(1) “**Elegit,**” what is—English Law.

The writ of *eligit* is a remedy which was originally given to the judgment-creditor by the Statute of Westminster the second, but it has been greatly modified by modern legislation. 13 Ed. I.C. 18 ; 1 and 2 Vic. C. 110. F

(2) **Elegit, nature of—Present form under English Law.**

In its present form, it is a royal command to the sheriff directing him to deliver to the judgment-creditor all the lands of the judgment-debtor, to hold the same until the amount of his debt with interest shall be levied. Goodeve, p. 383 (1897), R. P. G

(3) **Procedure to be adopted by the sheriff under the writ of “*elegit.*”**

(a) On the receipt of the writ, the sheriff, holds an enquiry, called an Inquisition, before a jury, for the purpose of ascertaining what lands in his bail-wick belong to the debtor, what estate he has in them, and their annual value. This proceeding is entirely *ex parte*, and no notice is given to the debtor, and nothing is done on the land itself. (*Ibid.*) H

(b) On completing the Inquisition, a formal statement of the proceedings under it is drawn up and sealed by the sheriff and the jurors. (*Ibid.*) I

(c) The sheriff then makes up and signs a formal statement of all that he has done in obedience to the writ, which statement when signed, is called the “return to the writ,” and he afterwards sends the writ and “the return to the writ” to the Supreme Court. This final act of the sheriff is sometimes called the “return of the writ.” (*Ibid.*) J

(4) “**Elegit**”—Effect of the “return to the writ”—English Law.

As soon as the sheriff sends his “return to the writ,” the lands comprised in it are said to be a “delivered in execution” to the execution-creditor ; the effect of this is to confer on him a legal right of entry, which he can enforce against the execution-debtor by an action to recover possession. Goodeve, p. 383. 1897 R.P. K

(5) “**Tenant by elegit,**” meaning of—Nature of his interest

The execution-creditor who obtains possession or receipt of the rents and profits is said to be “*tenant by elegit.*” and he has a chattel interest which he may hold till his debt with interest is satisfied out of the rents and profits. Co. Litt 43 b ; 2 Cruise Dig. 54. L

(6) **Elegit, what could be seized under.**

Under an *elegit*, all land can be seized in which the debtor has a legal estate in possession, or subject only to a term of years, or to an equitable mortgage ; or the entire equitable fee, or a legal term of years, or a copyhold estate, or land over which he has a disposing power which he can exercise for his own benefit. Goodeve p 384, 1897, R.P. M

Purchasers.

31. The *bona fide* payment to and the receipt of any person to whom any purchase or mortgage-money shall

Not bound to see to application of purchase-money, etc.

be payable upon any express or implied trust shall effectually discharge the person paying the same from seeing to the application, or being answerable for the

misapplication thereof¹.

(Notes.)

1.—“*The bona fide... thereof.*”

See notes on Ss. 12 and 42 of the Indian Trusts Act (II of 1882).

M1

Investment of Trust-funds.

32. Trustees having trust-money in their hands, which it is their duty to invest at interest, shall be at liberty, at their discretion, to invest the same in any Government securities¹, and such trustees shall also be at liberty, at their discretion, to call in any trust-funds invested in any other securities than as aforesaid, and to invest the same on any such securities as aforesaid, and also from time to time, at their discretion, to vary any such investments as aforesaid for others of the same nature².

On what securities trust-funds may be invested.

Provided always that no such original investment as aforesaid, and no such change of investment as aforesaid, shall be made where there is a person under no disability entitled in possession to receive the income of the trust-fund for his life, or for a term of years determinable with his life, or for any greater estate, without the consent in writing of such person³.

(Notes.)

1.—“*Shall be... securities.*”**Investment of trust moneys by trustees—Securities.**

See S. 20 of the Indian Trusts Act (II of 1882), and notes thereunder.

N

2.—“*To vary ... same nature.*”**Power of trustees to vary investments.**

See S. 40 of the Indian Trusts Act (II of 1882) and notes thereunder.

O

3.—“*Provided always... such person.*”

See S. 40 of the Indian Trusts Act (II of 1882) and notes thereunder.

P

Trustees and Executors.

33. In all cases where any property is held by trustees in trust for a minor, either absolutely or contingently on his attaining majority, or on the occurrence of any event previously to his attaining majority, it shall be lawful for such trustees, at their sole discretion, to pay to the guardians (if any) of such minor, or otherwise to apply for or towards the maintenance or education of such minor, the whole or any part of the income to which such minor may be entitled in respect of such property whether there be any other fund applicable to the same purpose, or any other person bound by law to provide for such maintenance or education or not;

Trustees may apply income of property of minors, &c., for their maintenance.

and such trustees shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time, in proper securities², for the benefit of the person who shall ultimately become entitled to the property from which such accumulations shall have arisen.

Provided always that it shall be lawful for such trustees at any time, if it shall appear to them expedient, to apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

(Notes).

1.—“Trustee may apply . . . maintenance.”

Power of trustees to give maintenance to minor beneficiaries.

See full notes under Ss. 36 and 41 of the Indian Trusts Act (II of 1882). Q

2.—Proper securities

Proper securities for investment of trust moneys.

See S. 20 of the Indian Trusts Act (II of 1882) and notes thereunder. Q 1

34. Whenever any trustee, either original or substituted, and whether appointed by any High Court or otherwise, shall die, or be six months absent from British India, or desire to be discharged from, or refuse, or become unfit or incapable, to act in the trusts or powers in him reposed, before the same shall have been fully discharged and performed, it shall be lawful for the person or persons nominated for that purpose by the deed, will, or other instrument creating the trust (if any), or if there be no such person, or no such person able and willing to act, then for the surviving or continuing trustees or trustee for the time being, or the acting executors or executor, or administrators or administrator, of the last surviving and continuing trustee, or for the retiring trustees, if they shall all retire simultaneously, or for the last retiring trustee, or where there are two or more classes of trustees of the instrument creating the trust, then for the surviving or continuing trustees or trustee of the class in which any such vacancy or disqualification shall occur (and for this purpose any refusing or retiring trustee shall, if willing to act in the execution of the power, be considered a continuing trustee), by writing to appoint any other person or persons to be a trustee or trustees in the place of the trustee or trustees so dying, or being absent from British India, or desiring to be discharged, or refusing or becoming unfit or incapable to act as aforesaid.

So often as any new trustee or trustees shall be so appointed as aforesaid, all the trust property (if any), which for the time being shall be vested in the surviving or continuing trustees or trustee, or in the heirs, executors, or administrators of any trustee, shall with all convenient speed

Transfer of trust-property to new trustees².

be conveyed and transferred so that the same may be legally and effectually vested in such new trustee or trustees, either solely or jointly with the surviving or continuing trustees or trustee as the case may require.

Every new trustee to be appointed as aforesaid, as well before as after such conveyance or transfer as aforesaid, and also every trustee appointed by any High Court, either before or after the passing of this Act, shall have the same powers, authorities, and discretions, and shall in all respects act as if he had been originally nominated a trustee by the deed, will, or other instrument (if any) creating the trust.

The Official Trustee may with his consent, and by the order of the High Court, be appointed under this section in any case in which only one trustee is to be appointed, and such trustee is to be the sole trustee.

(Notes).

1.—“Provision for appointment of new trustees on death, etc.”

(1) Death of a trustee or trustees - New trustees, appointment of.

See Ss. 73 and 74 of the Indian Trusts Act (II of 1882) and notes thereunder. **R**

(2) Appointment of new trustees by Court.

See notes on S. 74 of the Indian Trusts Act (II of 1882). **S**

(3) Rules for selecting new trustees.

See notes on Ss. 73 and 74 of the Indian Trusts Act (II of 1882). **T**

2.—“Transfer of trust property to new trustees.”

See notes on S. 75 of the Indian Trusts Act (II of 1882). **U**

3.—“Powers of new trustees”

V

See notes on S. 75 of the Indian Trusts Act (II of 1882).

4.—“Appointment... trustee.”

See S. 73 of the Indian Trusts Act (II of 1882). **W**

35. The power of appointing new trustees herebefore contained may be exercised in cases where a trustee nominated in a will has died in the lifetime of the testator.

(Notes).

1.—“Appointment... testator.”

See S. 73 of the Indian Trusts Act (II of 1882). **X**

36. The receipts in writing of any trustees or trustee for any money

payable to them or him by reason, or in the exercise, of any trusts or powers reposed or vested in them or him, shall be sufficient discharges for the money therein expressed to be received, and shall effectually exonerate the persons paying such money from seeing to the application thereof, or from being answerable for any loss or misapplication thereof.

(Notes).

1.—“Trustees’ receipt to be discharges.”

Power of trustees to give receipts—Effect of such receipts.

See S. 42 of the Indian Trusts Act, (II of 1882) and notes thereto.

Y

Every trust-instrument deemed to contain clauses for indemnity and reimbursement of trustees.

37. Every deed, will, or other instrument creating a trust, either expressly or by implication ¹, shall, without prejudice to the clauses actually contained therein, be deemed to contain a clause in the words or to the effect following, that is to say

“that the trustees or trustee for the time being of the said deed, will, or other instrument, shall be respectively chargeable only for such moneys, stocks, funds, and securities as they shall respectively actually receive, notwithstanding their respectively signing any receipt for the sake of conformity, and shall be answerable and accountable only for their own acts, receipts, neglects, or defaults, and not for those of each other, nor for any banker, broker, or other person with whom any trust-moneys or securities may be deposited, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor for any other loss ², unless the same shall happen through their own wilful default respectively; and also that it shall be lawful for the trustees or trustee for the time being of the said deed, will, or other instrument, to reimburse themselves or himself, or pay or discharge out of the trust-premises all expenses incurred in or about the execution of the trusts or powers of the said deed, will, or other instrument ³.

(Notes).

1 — “Every deed ... implication.”

Trusts, express and implied—Definition and nature of.

See notes under S. 3 of the Indian Trusts Act (II of 1882).

Z

2.—“ That the trustees...actually receive.. sake of conformity.. other loss.”

(1) Indemnity of trustees.

See S. 30 of the Indian Trusts Act (II of 1882) and notes thereto.

A

(2) Non-liability for co-trustee’s default.

See notes under S. 26 of the Indian Trusts Act (II of 1882).

B

(3) Trustee joining in receipt for conformity.

See notes under S. 26 of the Indian Trusts Act (II of 1882).

C

3.—“ To re-imburse or other instrument.”

Right to re-imburement of expenses.

See notes under Ss. 32 and 36 of the Indian Trusts Act (II of 1882).

D

38. It shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition, or any security for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims, and things whatsoever relating to the estate of the deceased, and for any of the purposes aforesaid to enter into, give, and execute such agreements, instruments of composition, releases and other things as they shall think expedient, without being responsible for any loss to be occasioned thereby.

Executors may compound, & etc.

(Notes.)

1.—“Executors may compound.”

See S. 43 of the Indian Trusts Act (II of 1882) and notes thereto.

E

Trustee, etc., making payment under power-of-attorney, not liable by reason of death of party giving power.

39. Repealed by the Powers-of-Attorney Act (VII of 1882), S. 6.

40. Where an executor or administrator liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned, whether before or after the passing of this Act, to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease, or agreement for a lease, as may have accrued due and been claimed up to the time of the assignment hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised, or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agreement for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary estate of the deceased to and amongst the parties entitled thereto, respectively, without appropriating any part, or any further part (as the case may be), of the estate of the deceased to meet any future liability under the said lease or agreement for a lease.

The executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease.

Nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

41. In like manner, where an executor or administrator liable as such to the rent, covenants, or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use¹, grant, or reservation, or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereinafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary estate of the deceased to and amongst the parties entitled thereto, respectively without appropriating any part or any further part (as the case may be) of such estate to meet any future liability under the said conveyance or agreement for a conveyance.

The executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance or agreement for conveyance.

Nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons, to or among whom the said assets may have been distributed.

(Notes).

1.—“ Whether any such rent . . . use.”

(1) “ Use,” what is—English Law.

(a) The purpose for which property was held by the person having the legal estate for the benefit of another, was termed a “ use.” Goodeve’s R.P. (1897). **F**

(b) A “ use” has been defined by Lord Coke, thus—. “ A trust or confidence, which is not issuing out of land, but as a thing collateral annexed in privity to the estate, and to the person, touching the land: the *cestui que use*” shall take the profits, and “ the feoffee to uses” shall make estates according to his direction. So that, he who had an “ use” had only a confidence and trust, for which he had remedies under equity and not under Common Law. Chudleigh’s Case, 1 Rep. 121 b. **G**

1.—“Whether any such rent . . . use”—(Concluded).

(2) “Uses,” examples of—“Statute of uses”—English Law.

(a) Where there is a limitation in this manner *viz.*,—“To A to the use of B,” before the Statute of uses, the legal estate in the land will vest in A, who must apply the rents and profits arising therefrom to the benefit of B, B being the owner of the equitable estate: but after the passing of the Statute of uses (27 Henry VIII, c. 10), the legal estate would no longer remain in A, and it would pass through A and become vested in B. Or in other words, B would himself be the owner of the land in law as well as in equity. See pp. 274—277 of Goodeve’s R.P. (1897). H

(b) The “Statute of uses” (27 Henry VIII, c. 10), was passed with the express object of abolishing the doctrine of “uses.” It unites the “legal seisin” or interest to the “equitable or beneficial interest.” It provides that the *cestui que use* shall have the same estate in the land as he has in the “use,” but also divests the person who is “seised to the use” of a corresponding portion of his estate and vests it in the *cestui que use*. In other words, the Statute “executes” the “use;” that is, it conveys the possession to the “use,” and transfers the “use” into possession, thereby making the *cestui que use* complete owner of the lands and tenements at law and equity. I

See pp. 276 and 277, (Goodeve (1897)).

J

N B.—For full history of the doctrine of “uses”—see pp. 268—297, of Goodeve’s R.P. 1897.

42. Where an executor or administrator shall have given such or the

As to distribution of assets of testator or intestate after notice given by executor and administrator.

like notices as in the opinion of the Court in which such executor or administrator is sought to be charged would have been given by the High Court in an administration-suit, for creditors and others to send in to the executor or administrator their claims against the estate of the testator or intestate, such executor or administrator shall, at the expiration of the time named in the said notices, or the last of the said notices, for sending in such claims, be at liberty to distribute the assets of the testator or intestate, or any part thereof, amongst the parties entitled thereto, having regard to the claims of which such executor or administrator has then notice, and shall not be liable for the assets or any part thereof so distributed to any person of whose claim such executor or administrator shall not have had notice at the time of distribution of the said assets, or a part thereof as the case may be.

Nothing in the present Act contained shall prejudice the right of any creditor or claimant to follow the assets or any part thereof into the hands of the person or persons who may have received the same respectively.

Trustee, executor, etc., may apply by petition to Judge of High Court for opinion, advice, etc., in management, etc., of trust-property 1.

43 Any trustee, executor, or administrator shall be at liberty, without the institution of a suit, to apply by petition to any Judge of the High Court for the opinion, advice, or direction of such Judge on any question respecting the management or administration of the trust-property or the assets of any testator or intestate.

Such application shall be served upon, or the hearing thereof shall be attended by, all persons interested in such application, or such of them as the said Judge shall think expedient

The trustee, executor, or administrator acting upon the opinion, advice or direction given by the said Judge, shall be deemed, so far as regards his own responsibility, to have discharged his duty as such trustee, executor, or administrator in the subject-matter of the said application :

Provided, nevertheless, that this Act shall not extend to indemnify any trustee, executor, or administrator, in respect of any act done in accordance with such opinion, advice, or direction as aforesaid, if such trustee, executor, or administrator shall have been guilty of any fraud or wilful concealment or misrepresentation in obtaining such opinion, advice, or direction, and the costs of such application as aforesaid shall be in the discretion of the Judge to whom the said application shall be made.

(Notes)

General.

(1) Scope of section.

- (a) It is no part of the duty of a Judge, under S. 43 of the Trustee's and Mortgagee's Act, to give any opinion on a point on the decision of which may depend questions of right or title. 7 B. 381 at 384. **K**
- (b) The questions arising in the administration contemplated by S. 43 are not questions which, involve difficulty in determining them. *Ibid.* **L**
- (c) The object of the section is to assist trustees in the execution of the trusts as to little matters of discretion. 7 B. 381 **M**
- (d) The Court should not deal, under the power given to it under S. 43, with a point of law, which is full of difficulty. 7 B. 381 at 385. **N**
- (e) Under S. 43, a trustee may apply, without instituting a suit, to any judge of the High Court, for his opinion, advice or direction, and by acting on such opinion, the trustee is deemed to have properly discharged his duty. 12 B. 638 at 644. **O**

(2) English Law analogous provision.

The section is substantially the same as S. 30 of Lord St. Leonards Act (22 and 23 Vic. C. 35).

1.—“Trustee, executor, etc., . . . may apply by petition . . . trust property.”

- (1) **Advice and direction in management of trust estate—Right to apply to Court for:**

See S. 34 of the Indian Trusts Act (II of 1882) and notes thereto.

P 1

- (2) **Powers of the Court under Section .**

A, a Hindu, died in 1865, possessed of a temple and of a piece of land near it which he bought in his life-time. By his will, he directed his executors to apply the income arising from the land in defraying the expenses connected with the temple. This was accordingly done by his son, whom he had appointed his executor. His son died in 1873, and in 1879, the petitioner, who was the son's widow, took out letters of administration, with the will annexed, to the estate of A, still unadministered. As administratrix, she continued to apply the income of the said land as directed in the will.

She subsequently filed another petition alleging that the said income, which amounted to about Rs. 900 per mensem was insufficient to keep up the said charity. She stated that a sum of Rs. 12, 600 was urgently required for certain purposes connected with the said charity, and that she had agreed with one Y that he should advance the said sum to her, to be expended as aforesaid, and that she should grant to him a lease of the said land for 99 years, with a proviso for renewal, at a rent of Rs. 350 per mensem. Subsequently her adopted son served her with a notice to desist from granting the said lease. She therefore, presented a petition, to the Court under S. 43 of the Trustees' and Mortgagees' Powers Act (XXVIII of 1866) praying:—

- (a) that she might be advised whether she had power to grant the said proposed lease,
- (b) that the said lease might be sanctioned or directed by the Court; and
- (c) that the Court might give such opinion, advice or direction in the circumstances of the case as the Court might think fit.

Held.—

- (1) that, under the section, the Court had no power to sanction the proposed lease, or to advise as to whether the petitioner had the power to grant it.
- (2) The Court will not under this section advise trustees as to disputed points of law or fact, but will do so only as to undisputed matters of management, such as questions of advancement, maintenance, change of investment, sale of a house, compromises, taking proceedings etc., and
- (3) that, as a matter of general principle, the trustee of the property in question could make a lease thereof for the benefit of the trust, or raise money by way of charge for the purposes of necessary repairs and maintenance; but with regard to the details of the amount, or as to the work to be done, the Court cannot give any opinion. 12 B. 638. Q

- (3) **Restrictions imposed upon the Court by the section.**

Obviously the Court must act with caution, and only advise in matters when the rights of the parties *inter se* are not in dispute either in law or in fact. 12 B. 638 at 644.

R

1.—“Trustee, executor, etc., . . . may apply by petition . . . trust property”—(Concluded).

(4) Administrator-General taking opinion of Court on questions respecting the administration—Refusal of Court to express opinion

The Administrator-General of Bombay having taken out letters of administration (having effect throughout the Bombay Presidency) to the estate of the deceased A, and having a balance in his hands to the credit of the said estate, after having fully administered the same, was applied to by X (the brother of the said A deceased), who had taken out letters of administration in England to the estate of his deceased brother, to hand over to him (the said X), the balance in question,—the said X claiming to be the administrator of the domicile of the deceased and, as such, to be entitled to all the personal assets of his estate wheresoever situated.

Being in doubt as to whether he might safely accede to the request, the Administrator General of Bombay by petition under S. 43 (1) of the Indian Trustees' and Mortgagees' Act XXVIII of 1866, submitted the question to the High Court for its opinion, advice and direction.

Held that the question being one of considerable difficulty and importance, and involving, moreover, in its decision, questions which might seriously affect the rights of the parties *inter se*, it was not a question such as was contemplated by S. 43 of the Indian Trustees' and Mortgagees' Act XXVIII of 1866, nor one upon which the Court ought to give any opinion merely on an *ex parte* petition of this character. 7 B. 381. S

General Provisions

44. For the purposes of this Act, a person shall be deemed to be entitled to the possession or to the receipt of the rents and income of immovable or moveable property, although his estate may be charged or incumbered, either by himself or by any former owner, or otherwise howsoever to any extent, but the estate or interests of the parties entitled to any such charge or incumbrance shall not be affected by the acts of the person entitled to the possession or to the receipt of the rents and income as aforesaid, unless they shall concur therein.

45. The provisions contained in this Act shall, except as hereinbefore otherwise provided, extend only to persons entitled or acting under a deed, will, codicil, or other instrument executed after this Act comes into operation, or under a will or codicil confirmed or revived by a codicil executed after that date, and only to property in British India and to cases to which English Law is applicable.

46. This Act may be called “The Trustees' and Mortgagees' Powers Act, 1866.”

47. Repealed by the Repealing Act 1874 (XVI of 1874).

(Application of Act to Straits Settlements.)

Tenants for life, etc., may execute powers, notwithstanding incumbrances.

Operation of Act.

Short title.

INDEX.

A

- Administrator*, General taking opinion of Court on questions respecting the administration—Refusal of Court to express opinion, **35**.
- Attached*, Things—to earth or permanently fastened to anything which is attached to earth, if immoveable property, *I—C*, **6—11**.
‘to the earth’—meaning of the expression, *I*, **6**.
Things—to earth. conveyance, effect of, *T—W*, **7**.
Emblements under English Law, if things attached to earth, *X—J*, **7, 8**.
If things imbedded in earth are things attached thereto and as such immoveable, *O*, **9**.
If things—to imbedded things, can be said to be—to earth, *B, C*, **10, 11**.

C

- Charge*, Definition of, *G*, **11**.
distinguished from mortgage, *H—J*, **11**.
- Conveyance*, Definition of—Various forms of—Formalities requisite for—What passes under—, *F*, **11**.

D

- Descent*, how traced, *S—X*, **23, 24**.
Tracing of—under English Law, *S, T*, **23**.
Devises to heir—English Law, *U, V* **23**
Imputation to heir of settlor—English Law, *W, X*, **23, 24**
Failure of heirs of purchaser—English Law, *Y*, **24**.
Cannons of— Changes made by Inheritance Act (1833) *Z*, **24**

E

- Elegit*, What is—English Law, *F*, **25**
Estates by—, *F—M*, **25**.
Nature of—Present form under English Law, *G*, **25**.
Procedure to be adopted by sheriff under writ of, *H—J*, **25**.
Effect of “return to the writ”—English Law, *K*, **25**.
Tenant by—, meaning of—Nature of his interest, *L*, **25**.
What could be seized under—, *M*, **25**.
- Estate*, Estates in English Law—their creation—“Words” of limitation necessary for their creation, *A*, **1**.
in fee simple under English Law—“Words of limitation” necessary for their creation—How they are conveyed, *Y*, **16**.

Estate—(Concluded).

for years under English Law—Definition, *A*, 24.

Assignment of, for years—English Law, *B—E*, 24.

Executor, Power of—to compound, *E*, 30.

I

Immoveable, Allowances charged on—property, if immoveable property, *Q*, 3.

Hereditary offices, if immoveable property—Hindu Law, *R*, 3.

Interest of widow in—property, if immoveable, *S*, 3.

Examples of benefits, construed as—property, *V*, 4.

Claim to maintenance, if included in the notion of—property: Nature of—Divergent views of the High Courts, *X—B*, 4.

Trees and shrubs, if—property, *N—S*, 6, 7.

Machinery planted in earth if—property, *E*, 9.

Trade fixtures, nature of—if they are—property, *S—A* 9, 10.

Sale of crops, trees, in a growing state—Nature of interest conveyed, *K—N*, 8, 9.

Erections put on land by trespasser—To whom they belong, *P*, *Q*, 9.

“*Interest*,” synonymous with “*estate*”. various estates—their conveyance, their creation, *U*, 14.

L

Land, Significance of the word—English Law, *C—H*, 2.

Extensive meaning sometimes cut down by context, *I*, *J*, 2, 3.

Purchase of—by Railway Companies—What passes under the purchase, *K*, 3.

Significance of the word—under statutes, *L*, *M*, 3.

Benefit to arise out of—, *N—Q*, 3–6.

Scope of the expression—under English Law, *N*, 3.

Haq-i-chaharim, an incident attaching to land, *P*, 3.

Hat, a benefit arising out of land, *T*, *U*, 4.

Lease, Forfeiture of—by lessee—ways by which forfeiture takes place, *D*, 19.

License, definition of, *C*, 19.

M

Maintenance, Giving—to minor beneficiaries—Powers of trustees, *Q*, 27.

Mortgage decree, if included in the conception of immoveable property, *C*, *D*, 3.

Equity of redemption in mortgaged property, if construed as immoveable property, *E—G*, *P*, 5.

What are and what are not included in the conception of immoveable property, *H—K*, 5, 6.

Definition of, *D*, 11.

Mortgagor, Definition of, *E*, 11.

P

Power, distinguished from estate—English Law, *J*, 21.

certain expressions explained with respect to—, *K—M*, 21.

Powers general and special, *N*, 21.

Division of powers: English Law, *O*, 21.

INDEX.

Property, Immoveable—definition, *B*, 2.

Toda giras hak, included in the conception of immoveable—, *O*, 3.

R

Reversion, What is—English Law, *E*, 20.

Examples of, *F*, *G*, 20.

Nature of, *H*, 20.

T

Trust, Sale of—property in lots—Trustee's power, *M*, 12.

Investment of—monies—securities for such investment, *Q*, 13

for payment of debts—how such debts are paid—Powers of such trustees, *P*, 22.

Transfer of—Property to new trustees, *U*, 28.

Express and implied—Definition and nature of, *Z*, 29.

Trustee, Trustees for sale—Their disabilities, *L*, 12.

Powers of trustees to sell under special conditions, *N*, 12.

Power of trustees to buy in and re-sell, *O*, 13.

Trustees for sale—power to convey, *P*, 13.

power of trustees to vary investments, *R*, 13.

Death of— appointment of new trustees, *R*, 28.

Appointment of new trustees by Court, *S*, 28.

Rules for selecting new trustees, *T*, 28.

Powers of new trustees, *V*, 28.

predeceasing testator—appointment of new trustees, *X*, 28.

indemnity of trustees, *A*, 29.

Non-liability of—for co-trustees default, *B*, 29.

Joining in receipt for conformity, *C*, 29.

trustees right to reimbursement of—expenses, *D*, 29.

power of trustees to give receipts—Effect of such receipts, *Y*, 29.

Advice and direction in management of trust estate Right of trustees to apply to Court for, 34.

Powers of Court to give directions to—in respect of management of estate, *Q*, 34.

Restiction Court in respect of giving directions to trustee as regards management of trust estate, *R*, 34.

U

Use, What is— English Law, *F*, *G*, 31.

Examples of—Statute of uses—English Law, *H—J*, 32.

THE LAWYER'S COMPANION SERIES.

THE
INDIAN RAILWAYS ACT, 1890.

(ACT IX OF 1890).

(WITH THE CASE-LAW THEREON)

BY

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THE INDIAN RAILWAYS ACT, 1890.

CONTENTS.

CHAPTER I

PRELIMINARY.

SECTIONS.

1. Title, extent and commencement
2. Repeal.
3. Definitions.

CHAPTER II

INSPECTION OF RAILWAYS

4. Appointment and duties of Inspectors
5. Powers of Inspectors.
6. Facilities to be afforded to Inspectors

CHAPTER III

CONSTRUCTION AND MAINTENANCE OF WORKS.

7. Authority of Railway administrations to execute all necessary works.
8. Alteration of pipes, wires and drains.
9. Temporary entry upon land for repairing or preventing accident
10. Payment of compensation for damage caused by lawful exercise of powers under section 7, 8 or 9.
11. Accommodation works.
12. Power for owner, occupier or local authority to cause additional accommodation works to be made.
13. Fences, screens, gates and bars.
14. Over and under bridges.
15. Removal of trees dangerous to or obstructing the working of a railway.

CHAPTER IV.

OPENING OF RAILWAYS.

16. Right to use locomotives.
17. Notice of intended opening of a railway.

SECTIONS.

18. Sanction of the Government a condition precedent to the opening of a railway.
19. Procedure in sanctioning the opening of a railway.
20. Application of the provisions of the three last foregoing sections to material alterations of a railway.
21. *Exceptional provision.*
22. Power to make rules with respect to the opening of railways.
23. Power to close an opened railway.
24. Reopening of a closed railway.
25. Delegation of powers under this chapter to Inspectors.

CHAPTER V.

RAILWAYS COMMISSIONS AND TRAFFIC FACILITIES.

Railway Commissions

26. Constitution of Railway Commission.
27. Restriction of jurisdiction of Railway Commission to cases specially referred.
28. Reference of cases to Railway Commission.
29. Constitution of Railway Commission in session.
30. Powers of Railway Commission
31. Appeals from orders of Railway Commission
32. Operation of orders of Railway Commission.
33. Assessors
34. Power of the Governor-General in Council to make rules for the purposes of this chapter
35. Costs of proceedings under this chapter
36. Execution of order of Railway Commission and High Court.
37. Evidence of documents
38. Submission to the Governor-General in Council of special reports by Railway Commission
39. Dissolution of Railway Commission
40. Finality of orders of Railway Commission subject to the foregoing provisions of this chapter
41. Bar of jurisdiction of ordinary Courts in certain matters cognisable by Railway Commission.

Traffic Facilities.

42. Duty of Railway Administrations to arrange for receiving and forwarding traffic without unreasonable delay and without partiality.
43. Undue preference in case of unequal rates for like traffic or services.
44. Provision for facilities and equal treatment where ships or boats are used which are not part of a railway.
45. Terminals
46. Power of Railway Commission to fix terminals.

CHAPTER VI.

WORKING OF RAILWAYS.

General.

SECTIONS.

47. General rules.
48. Disposal of differences between railways regarding conduct of joint traffic.
49. Agreements with the Governor-General-in Council for construction or lease of rolling stock
50. Powers of railway companies to enter into working agreements.
51. Establishment of ferries and roadways for accommodation of traffic.
52. Returns.

Carriage of Property.

53. Maximum load for waggons.
54. Power for railway administrations to impose conditions for working traffic.
55. Lien for rates, terminals and other charges.
56. Disposal of unclaimed things on a railway.
57. Power for railway administrations to require indemnity on delivery of goods in certain cases.
58. Requisitions for written accounts of descriptions of goods.
59. Dangerous or offensive goods.
60. Exhibition to the public of authority for quoted rates.
61. Requisitions on railway administrations for details of gross charges

Carriage of Passengers.

62. Communication between passengers and railway servants in charge of trains.
63. Maximum number of passengers for each compartment.
64. Reservation of compartments for females.
65. Exhibition of time table and tables of fares at stations.
66. Supply of tickets on payment of fares.
67. Provision for case in which tickets have been issued for trains not having room available for additional passengers.
68. Prohibition against travelling without pass or ticket
69. Exhibition and surrender of passes and tickets.
70. Return and season tickets.
71. Power to refuse to carry persons suffering from infectious or contagious disorder.

CHAPTER VII.

RESPONSIBILITY OF RAILWAY ADMINISTRATIONS AS CARRIERS.

72. Measure of the general responsibility of a railway administration as a carrier of animals and goods.

SECTIONS.

- 73. Further provision with respect to the liability of a railway administration as a carrier of animals.
- 74. Further provision with respect to the liability of a railway administration as a carrier of luggage.
- 75. Further provision with respect to the liability of a railway administration as a carrier of articles of special value.
- 76. Burden of proof in suits in respect of loss of animals or goods.
- 77. Notification of claims to refunds of over charges and to compensation for losses.
- 78. Exoneration from responsibility in case of goods falsely described.
- 79. Settlement of compensation for injuries to officers, soldiers, and followers on duty.
- 80. Suits for compensation for injury to through-booked traffic.
- 81. (*Repealed*)
- 82. Limitation of liability of railway administration in respect of accidents at sea.

CHAPTER VIII

ACCIDENTS.

- 83. Report of railway accidents
- 84. Power to make rules regarding notices of, and enquiries into, accidents.
- 85. Submission of return of accidents
- 86. Provision for compulsory medical examination of person injured in railway accident

CHAPTER IX.

PENALTIES AND OFFENCES.

Forfeitures by Railway Companies.

- 87. Penalty for default in compliance with requisition under S. 13.
- 88. Penalty for contravention of section 16, 18, 19, 20, 21 or 24.
- 89. Penalty for not having certain documents kept or exhibited at stations under section 47, 54 or 65.
- 90. Penalty for not making rules as required by section 47.
- 91. Penalty for failure to comply with decision under section 48.
- 92. Penalty for delay in submitting returns under section 52 or 35.
- 93. Penalty for neglect of provision of section 53 or 63 with respect to carrying capacity of rolling stock.
- 94. Penalty for failure to comply with requisition under section 62 for maintenance of means of communication between passengers and railway servants.
- 95. Penalty for failure to reserve compartment for females under section 64.
- 96. Penalty for omitting to give the notices of accidents required by section 83 and under section 84.

CONTENTS.

SECTIONS.

- 97. Requiry of penalties.
- 98. Alternative or supplementary character of remedies afforded by the foregoing provisions of this chapter.

Offences by Railway Servants.

- 99. Breach of duty imposed by section 60.
- 100. Drunkenness.
- 101. Endangering the safety of persons.
- 102. Compelling passengers to enter carriages already full.
- 103. Omission to give notice of accident.
- 104. Obstructing level-crossings
- 105. False returns.

Other Offences.

- 106. Giving false account of goods.
- 107. Unlawfully bringing dangerous or offensive goods upon a railway
- 108. Needlessly interfering with means of communication in a train
- 109. Entering compartment reserved or already full or resisting entry into a compartment not full
- 110. Smoking.
- 111. Defacing public notices.
- 112. Fraudulently travelling or attempting to travel without proper pass or ticket.
- 113. Travelling without pass or ticket or with insufficient pass or ticket or beyond authorized distance.
- 114. Transferring any half of return ticket.
- 115. Disposal of fines under the two last foregoing sections.
- 116. Altering or defacing pass or ticket.
- 117. Being or suffering person to travel on railway with infectious or contagious disorder.
- 118. Entering carriage in motion, or otherwise improperly travelling on a railway.
- 119. Entering carriage or other place reserved for females.
- 120. Drunkenness or nuisance on a railway
- 121. Obstructing railway servant in his duty
- 122. Trespass and refusal to desist from trespass
- 123. Disobedience of omnibus drivers to directions of railway servants
- 124. Opening or not properly shutting gates.
- 125. Cattle-trespass
- 126. Maliciously wrecking or attempting to wreck a train.
- 127. Maliciously hurting or attempting to hurt persons travelling by railway.
- 128. Endangering safety of persons travelling by railway by wilful act or omission.
- 129. Endangering safety of persons travelling by railway by rash or negligent act or omission.
- 130. Special provision with respect to the commission by children of acts endangering safety of persons travelling by railway.

SECTIONS.

Procedure.

- 131. Arrest for offences against certain sections.
- 132. Arrest of persons likely to abscond or unknown.
- 133. Magistrates having jurisdiction under Act.
- 134. Place of trial

CHAPTER X.

SUPPLEMENTAL PROVISIONS.

- 135. Taxation of railways by local authorities.
- 136. Restriction on execution against railway property.
- 137. Railway servants to be public servants for the purposes of Chapter IX of the Indian Penal Code.
- 138. Procedure for summary delivery to railway administration of property detained by railway servant.
- 139. Mode of signifying communications from the Governor-General-in-Council.
- 140. Service of notices on railway administrations.
- 141. Service of notices by railway administrations.
- 142. Presumption where notice is served by post.
- 143. Provisions with respect to rules
- 144. Delegation of powers of Governor General in Council.
- 145. Representation of managers and Agents of Railways in Courts.
- 146. Power to extend Act to steam-tramways.
- 147. Power to exempt railways from Act.
- 148. Matters supplemental to the definitions of "railways" and "railway servant."
- 149. Amendment of the Indian Penal Code.
- 150. Amendment of the Sindh-Pishin Railway Act, 1887.

THE FIRST SCHEDULE.

ENACTMENTS REPEALED.

THE SECOND SCHEDULE.

ARTICLES TO BE DECLARED AND INSURED

THE INDIAN RAILWAYS ACT, 1890.

ACT IX OF 1890.

RECEIVED THE G-G.'S ASSENT ON THE 21ST MARCH, 1890

*An Act to consolidate, amend, and add to the Law relating to
Railways in India.*

WHEREAS it is expedient to consolidate, amend, and add to the law relating to railways in India ; It is hereby enacted as follows :—

CHAPTER I

PRELIMINARY.

Title, extent, and
commencement.

1. (1) This Act may be called the Indian Railways Act, 1890 ¹

(2) It extends to the whole of British India² inclusive . . . (in so far as it has been or may be extended under the provisions of the Sindh-Pishin Railway Act, 1887³ of British Baluchistan, and applies also to all subjects of Her Majesty within the dominions of Princes and States in India⁴ in alliance with Her Majesty, and to all native subjects of Her Majesty without and beyond British India and those dominions⁵ ; and

(3) It shall come into force on the first day of May, 1890.

N.B.—The words “ of Upper Burma and ” after the word “ inclusive,” were repealed by the Burma Laws Act, 1898 (XIII of 1898), Burma Code.

(Old Acts)

Act IV of 1879 S. 1 (Corresponding to S. 1 (1) (2) & (3), present Act).

Act XVIII of 1854 No corresponding provision.

(Notes).

1.—“ Indian Railways Act, 1890.”

(1) Preparation of an Indian Railway Code.

The—consistent, so far as public interests permit, with the letter of the contracts subsisting between the Government and Railway Companies, has been under consideration for many years, and the Indian Railways Bill has been drawn with special reference to the objections to which the drafts prepared in 1866 and in 1884 were considered both in India, and in England to be open. (See *Statements of objects and Reasons*).

1.—“Indian Railways Act, 1890”—(Continued).

(2) Public General Acts of Parliament applicable to Railway Companies in India.

(a) 31 AND 32 VICT. C. 26.

This statute enables certain Guaranteed Indian Railway Companies, *e g.*, the G.I.P. Ry. Co., E.I. Ry. Co., B. B. & C I. Ry. Co., Scinde Ry. Co., Eastern Bengal Ry. Co, and the O & R. Ry. Co., Ltd., to raise money on Debenture Stock. **B**

(b) 36 AND 37 VICT. C. 43.

This statute enables all Railway Companies to issue and register shares and securities in India. **C**

(c) 42 AND 43 VICT. C. 11. THE INDIAN GUARANTEED RAILWAYS ACT (1879).

This Act enables the Guaranteed Railway Companies in India and the Secretary of State for India in Council to enter into agreements with respect to the working of Railways and with respect to telegraphs, and confers upon those companies additional powers with respect to their undertakings. **D**

(d) 46 AND 47 VIC. C. 30.

This Act authorises companies registered under the English Companies' Act, 1862, to keep local registers of their members in British Colonies (including India) **E**

(e) 57 AND 58 VICT. C. 12.

This Act enables Indian Railway Companies (registered under the English Companies' Act (1862—1890), to pay interest out of capital during construction. **F**

(3) Special Acts of Parliament applying to or which have applied to Railway Companies in India.

(a) ASSAM RAILWAYS AND TRADING Co.—

60 and 61 Vict., ch. xvii.

(b) B. B and C. I. RY. Co.—

(i) 18 and 19 Vict, ch., cxiii ;

(ii) 22 and 23 Vict., ch., cii ,

(iii) 61 and 62 Vict., ch., xlix.

(c) CALCUTTA AND SOUTH-EASTERN RY. Co —

20 and 21 Vict., ch , xxii.

(d) E.I. RY. Co.—

(i) 12 and 13 Vit., ch. xciii ,

(ii) 16 and 17 Vict. ch. cccxxvi ,

(iii) 18 and 19 Vict., ch. xxxviii ,

(iv) 19 and 20 Vict., ch. cxxi ;

(v) 27 and 28 Vict., ch. clvii ;

(vi) 42 and 43 Vict., ch. 43 . ch. ccvi

(vii) 43 Vict., ch. 10 ; •

(viii) 44 and 45 Vict., ch. 53 ;

(ix) 48 and 49 Vict., ch. 25 ,

(x) 55 and 56 Vict., ch. x ,

(xi) 58 and 59/Vict., ch. xx.

1.—“*Indian Railways Act, 1890*”—(Conc uded).

(e) E. B. Ry. Co.—

- (i) 20 and 21 Vict., ch. clix ;
- (ii) 29 and 30 Vict., ch. cxxxvi ;
- (iii) 47 and 48 Vict., ch. cciv.

(f) G.I.P. Ry. Co.—

- (i) 12 and 13 Vict., ch. lxxxiii ;
- (ii) 17 and 18 Vict., ch. xlv
- (iii) 63 and 64 Vict., ch. cxxxviii ;
- (iv) 1 Edw. vii., ch. 25.

(g) GREAT SOUTHERN INDIA Ry. Co.—

- (i) 21 and 22 Vict., ch. cxxxviii ,
- (ii) 23 and 24 Vict., ch. xxxix ;
- (iii) 37 and 38 Vict., ch. cxii.

(h) MADRAS RAILWAY Co.—

- (i) 16 and 17 Vict., ch. xlv :
- (ii) 17 and 18 Vict., ch. xxxix ;
- (iii) 18 and 19 Vict., ch. xi.

(i) O. and R. Ry. Co.—

- (i) 21 and 22 Vict., ch. lxxxiii ,
- (ii) 51 and 52 Vict., ch. l.

(j) SCINDE Ry. Co.—

- (i) 18 and 19 Vict., ch. cxv ,
- (ii) 20 and 21 Vict., ch. clx ;
- (iii) 32 and 33 Vict., ch. lxxx.

(k) SOUTH INDIAN Ry. Co.—

- (i) 21 and 22 Vict., ch. cxxxviii ,
- (ii) 37 and 38 Vict., ch. cxii ;
- (iii) 51 and 52 Vict., ch. v ;
- (iv) 53 and 54 Vict., ch. 6.

2.—“*Extends to the whole of British India.*”(1) “**British India**” meaning.

The term—shall mean “all territories and places within Her Majesty’s dominions, which are for the time being governed by Her Majesty through the Governor-General of India, or through any Governor or other Officer subordinate to the Governor-General of India. See S. 3, cl. (7), General Clauses Act (X of 1897).” H

(2) **Scope of the term “British India.”**

By Acts XIV and XV of 1874, not only Aden,* but the Laccadive Islands in the Indian Ocean, the Andaman and Nicobar Islands, and Ajmere and Merwara in the centre of Rajaputana, are declared to be parts of British India, which shows that the Indian Legislature has given to the words “British India” a much more extended meaning than, at first sight, they would appear to indicate. 9 B. 244 (249). I

2. —“ Extends to the whole of British India ”—(Concluded).

(3) Railway station in Native State—Cession of jurisdiction—Cession of territory.

The applicant was charged with having imported bhang into the Presidency of Bombay, inasmuch as a parcel containing the bhang and bearing his name and address was received at Kalol, a railway station in a Native State. It appeared that the criminal jurisdiction along the line of railway was ceded to the Government of India, but there had been no cession of territory. *Held*, that no offence was committed unless the importation was into the Presidency of Bombay, that is, into the territories which formed part of British India, and if the land on which the offence was alleged to have been committed had not actually been ceded, it could not form part of British India. 5 Bom.L.R. 873. J

3.—“ Extended ... Sind Pishin Railway Act, 1887.”

Application of the Railway Act.

See S. 3, Sind Pishin Railway Act, XI of 1887 and S. 150, *infra*. J1

4.—“ India.”

(1) India—Definition in General Clauses Act.

(a) “India” shall mean British India, together with any territories of any Native Prince or Chief under the Suzerainty of Her Majesty, exercised through the Governor-General of India or through any Governor or other Officer subordinate to the Governor-General of India (See S. 3, cl. 27, General Clauses Act, X of 1897). K

(b) “India,” as distinguished from British India, includes the territories of Native States. 24 and 25 Vict., C. 67, S. 22; 28 and 29 Vict., C. 15, S. 3, etc., cited in Ilbert's Government of India, 2nd Ed., p. 264. L

(2) Penal Code, applicability of, to such parts of railways as run through Native States.

The Penal Code has been extended, or rendered applicable to such parts of the following railways as pass through Native States—

(a) Bhaunagar-Gondal.

Bhaunagar-Gondal-Junagad-Porbander Railway.

Jetalsar Virawal section—Dhoraji-Porbander section.

Jetalsar-Rajkot section.

(b) Bombay, Baroda and Central India Railway.

(c) Great India Peninsula Railway.

(d) Madras Railway.

(e) Mysore.

Kolar Gold Fields Railway.

Mysore section of Southern Maharatta Railway.

Mysore State Railway.

(f) Western Rajaputana Railway.

Rajaputana-Malwa Railway.

Rewari-Ferozpur section.

(g) Indian Midland Railway.

4.—“ India ”—(Concluded).

- (h) Morvi State Railway.
- (i) Bengal-Nagpore Railway.
- (j) Delhi-Umballa-Kalka Railway.
- (k) North-Western (formerly Sind-Punjab and Delhi) Railway.
- (l) Jammu and Kashmir Railway.
- (m) Nizam's Guaranteed State Railway.
- (n) Southern Maharatta Railway.—
 - South Deccan section.
 - West Deccan line
 - East Deccan line.
 - Harihar Branch.
- (o) Drangadhra Railway.
- (p) Jamnagar Railway.
- (q) Kolhapur State Railway.
- (r) Ahmedabad-Parantij Railway.
- (s) Koti-Rohri Railway.
- (t) Mehsana-Virangam Railway.
- (u) Palanpur-Disa Railway.
- (v) Rajpipla State Railway.
- (w) Tapti Valley Railway.
- (x) Oudh and Rohilkand State Railway —
 - Bareilly-Rampur-Moradabad section
- (y) Southern Punjab Railway—
 - Bharatpur and Bikanir section.
- (z) Cawnpore-Achnera State Railway.
- (aa) Goona-Bavan Railway.
- (bb) Barsi Light Railway.
- (cc) Dhond Maumad Railway.
- (dd) Hyderabad Godavery Valley Railway.
- (ee) Godhra--Rutlam Nagda Railway, etc., etc.

M

5.—“ Beyond . . . dominions.”

Power to exempt Railways from Act

See S. 147, *infra*.

N

2. (1) On and from that day the enactments specified in the first schedule are repealed to the extent mentioned in the third column thereof.

(2) But all rules, declarations, and appointments made, sanctions and directions given, forms approved, powers conferred, and notifications published under any of those enactments, or under any enactment repealed by any of them, shall, so far as they are consistent with this Act, be deemed to have been respectively made, given, approved, conferred, and published under this Act ¹.

(3) Any enactment or document referring to any of those enactments, or to any enactment repealed by any of them, shall, so far as may be, be construed to refer to this Act, or to the corresponding portion thereof.

Old Acts

Act IV of 1879 .. S. 2 Corresponding to (1) and (2).
Act XVIII of 1854 .. No corresponding provision.

N.B.—Sub-section (3) is new.

(Note).

1.—“*Made, given....Act.*”

Cf. S 17 (5), *infra*.

0

Definitions.

3. In this Act, unless there is something repugnant in the subject or context.

(1) “*tramway*” means a tramway constructed under the Indian Tramways Act, 1886, or any special Act relating to tramways:

(2) “*ferry*” includes a bridge of boats, pontoons, or rafts, a swing-bridge, a flying bridge, and a temporary bridge, and the approaches to, and landing places of, a ferry

Old Act.

Sub-Ss (1) and (2) are new.

(3) “*inland water*” means any canal, river, lake, or navigable water in British India:

Old Act.

This sub-section is new.

(Note).

1.—“*Inland water.*”

Analogous provision.

Cf. S. 5 (3), Act VI of 1884 (*Inland Steam Vessels*).

P

(1) “*railway*” means a railway, or any portion of a railway, for the public carriage of passengers, animals, or goods, and includes—

- (a) all land within the fences or other boundary-marks indicating the limits of the land appurtenant to a railway;
- (b) all lines of rails, sidings, or branches worked over for the purposes of, or in connection with, a railway;
- (c) all stations, offices, warehouses, wharves, workshops, manufacturing, fixed plant and machinery, and other works constructed for the purposes of, or in connection with, a railway: and

- (d) all ferries, ships, boats, and rafts which are used on inland waters for the purposes of the traffic of a railway, and belong to, or are hired or worked by, the authority administering the railway :

Old Acts.

Act IV of 1879	..	S. 3.
Act XVIII of 1854	..	S. 1.

(Notes).

1.—“Railway.”

(1) Sources of sub-sec.

See Twelfth Annual Report, Railway Commissioners, p. 1.

(2) Cl. (4), sub-cl. (d).

Sub-cl (d) of the definition of “railway” has been restricted to such vessels as are used on inland waters within the local extent of the Act. It has been held that the corresponding clause in Act IV of 1879, must be read in this restricted sense, as, apart from the local extent of that Act, a wider construction of the clause might bring the Railways Act into collision with the Merchant Shipping Acts, and the provisions of the general law relating to the carriage of passengers and goods by Sea. (*See Statement of Objects and Reasons.*)

- (5) “Railway company¹” includes any persons, whether incorporated or not, who are owners or lessees of a railway, or parties to an agreement for working a railway :

Old Acts.

Act IV of 1879	} No corresponding provision.
Act XVIII of 1874	

(Notes).

1.—“Railway Company.”

(1) Analogous provision.

Cf. the Regulation of Railways Act, 1871 (34 and 35 Vic. c. 78, S. 2).

(2) “Railway”—To what it refers.

For the purpose of S. 3, cls. (5) (6) and (7), the word ‘railway’ whether it occurs alone or as a prefix to another word, has reference to a railway or portion of the railway under construction, and a railway not used for the public carriage of passengers, animals or goods, as well as to a railway within the definition of that word in S. 3 (4), (*See S. 148 (1) infra, and Statement of Objects and Reasons.*)

- (6) “railway administration¹” or “administration,” in the case of a railway administered by the Government or a Native State means the Manager of the railway, and includes the Government or the Native State, and, in the case of a railway administered by a railway company, means the railway company :

Old Acts.

Act IV of 1879	..	S. 3.
Act XVIII of 1854	..	No corresponding provision.

(Notes).**I.—“ Railway Administration. ”****Railway Administration—Necessity for the definition.**

- (a) For the purpose of Ch. VII, *infra*, relating to the responsibility of railway administrations as carriers, it is proper to define the expression “ railway administration,” in the case of a railway administered by the Government or a Native State, to include the Government or State as the case may be (*See Statement of Objects and Reasons*) **U**
- (b) In the Indian Railways Act, 1879 the expression, “ railway administration— was defined as meaning in the case of a railway worked by Government, the manager of such railway and the expression did not include Government 4 O. C. 123 (196). **Y**
- (c) The same expression in such a case, although it still means the manager, now includes the Government, so that wherever the expression is used in the present Act, it must, unless there is something repugnant in the subject or context, also mean the Government. (*Ibid*). **W**
- (d) In the case of a railway administered by the Government, if a railway administration is liable for compensation, it is the Government which has to make compensation. (*Ibid*). **X**
- (e) It was probably for this reason that the expression “ railway administration ” was defined in the Act of 1890, so as to include the Government (*Ibid*). **Y**
- (f) The definition suggests that the framers of the Act contemplated that a suit, in which compensation was claimed under Ch. VII *infra*, should, where the railway is administered by the Government, be brought against the Government. (*Ibid*) **Z**

(7) “ railway servant¹ ” means any person employed by a railway administration in connection with the service of a railway :

Old Acts.

Act IV of 1879	..	S. 3.
Act XVIII of 1854	..	No corresponding provision.

(Note).**I.—“ Railway servant. ”****Goods clerk.**

A—employed by a railway administration is a railway servant within the meaning of S. 3 (7) of the Act. 9 P. R. 1898 (Cr.) **A**

(8) “ inspector ” means an Inspector of Railways appointed under this Act .

Old Act.

This definition is new

(9) “ goods¹ ” includes ² inanimate things of every kind :

Old Acts.

Act IV of 1879	}	No corresponding provision.
Act XVIII of 1854		

(Notes).**1.—“Goods.”****Analogous provision.**

Cf. the Railway Clauses Act 1845 (8 & 9 Vic, c. 20), S. 3.

2.—“Includes.”**“Include”—Meaning.**

(a) “When, in an interpretation clause, it is stated that a certain term ‘includes’ so and so, the meaning is that the term retains its ordinary meaning, and the clause enlarges the meaning of the term, and makes it include matters, which the ordinary meaning would not include. *Per* Lord Esher in *Rodger v. Harrison*, 1 Q.B. (1893), p. 167. **C**

(b) The use of the term, ‘includes’, shows that the term indicated is not meant to be defined. 9 B.H.C. 99 (106). **D**

(c) The word “include” in the General Clauses Act is intended to be enumerative, not exhaustive. 2 M. 5 (7). **E**

(d) When the Legislature intends to exhaust the signification of the word in interpreted, the word “mean” is used. (*Ibid*). **F**

(e) Where a definition “include,” certain persons or things, it does not necessarily exclude other persons or things not so included; for, when a definition is intended to be exclusive, it would seem that the form of the words is “means and includes”. 4 C. 492. **G**

(10) “rolling-stock¹” includes locomotive engines, tenders, carriages, wagons, trucks, and trolleys of all kinds:

Old Acts.

Act IV of 1879	}	No corresponding provision.
Act XVIII of 1854		

(Note).**1.—“Rolling stock.”****Analogous provision.**Cf. S. 2, the Rolling Stock Protection Act, 1872 (35 and 36 Vic. c. 50, S. 2). **H**

(11) “traffic¹” includes rolling-stock of every description as well as passengers, animals,² and goods.

Old Acts.

Act IV of 1879	}	No corresponding provision.
Act XVIII of 1854		

(Notes).**1.—“Traffic.”****Analogous provision.**

Cf. S. 1, the Railway and Canal Traffic Acts, 1854 (17 and 18 Vic., c. 31).

2.—“Animals.”

(a) Nowhere in the Act, is the term “animal” defined.

(b) *Ghose, J.*, in deciding that a crab was an ‘animal’ as defined by S. 2, Act XI of 1890, *viz.*, “domestic or captured animal”, said, “there can, I think, be no doubt whatever on the point, for the word “animal” ordinarily means an organised or living being having sensation and power of voluntary motion, an inferior or irrational being as distinguished from man” *Per Ghose, J.*, in 24 C 881 (885). J

(12) “through traffic” means traffic which is carried over the railways of two or more railway administrations :

Old Act.

This definition is new

• (13) “rate” includes any fare, charge, or other payment for the carriage of any passenger, animal, or goods :

Old Acts.

Act IV of 1879
Act XVIII of 1854

{

No corresponding provision.

This clause is new.

(Note).

1.—“Rate.”

Analogous provision.

Cf. S. 2, the Railway Rolling Stock Protection Act, 1872 (35 and 36 Vic., S. 3, The Railways Clauses Act, c. 50) and (8 Vict., c. 20). K

(14) “terminals¹” includes charges in respect of stations, sidings, wharves, depots, warehouses, cranes, and other similar matters, and of any services rendered thereat .

Old Acts.

Act IV of 1879
Act XVIII of 1854

{

No corresponding provision.

This clause new.

(Note).

1.—“Terminals.”

Analogous Provision.

Cf. S. 55, the Railway and Canal Traffic Act, 1888 (51 and 52 Vic, c. 25). L

(15) “pass” means an authority given by a railway administration, or by an officer appointed by a railway administration in this behalf, and authorizing the person to whom it is given to travel as a passenger on a railway gratuitously :

Old Act.

This definition is new.

(16) “ticket” includes a singleticket, a return ticket, and a season ticket :

Old Act.

This definition is new.

(17) "maund 1" means a weight of three thousand two hundred tolas, each tola being a weight of one hundred and eighty grains Troy: and

Old Act.

This definition is new.

(Note).

1.—"Maund."

"Maund."

82 29 lbs	=	1 Maund;
27·22 Maunds	=	1 Ton.

M

(18) "Collector 1" means the chief officer in charge of the land revenue administration of a district, and includes any officer specially appointed by the Local Government to discharge the functions of a Collector under this Act.

Old Acts.

Act IV of 1879	}	No corresponding provision.
Act XVIII of 1854		

(Note).

1.—"Collector."

Collector—Definition.

See also the definition in S. 3 (10), Act X of 1897 (General Clauses Act).

N

CHAPTER II.

INSPECTION OF RAILWAYS.

Appointment
and duties of Ins-
pectors 1.

4. (1) The Governor-General in Council² may appoint persons, by name or by virtue of their office, to be Inspectors of Railways.

(2) The duties of an Inspector of Railways shall be—

- (a) to inspect railways with a view to determine whether they are fit to be opened for the public carriage of passengers, and to report thereon to the Governor-General in Council as required by this Act;
- (b) to make such periodical or other inspections of any railway or of any rolling-stock used thereon as the Governor-General in Council may direct;
- (c) to make inquiry under this Act into the cause of any accident on a railway;

(d) to perform such other duties as are imposed on him by this Act or any other enactment for the time being in force relating to railways.

Old Acts.

Act IV of 1879 ... S. 5-A (corresponding to sub-S. 1 of the present Act).

Act XVIII of 1854 ... No corresponding provision. Sub-S. (2) is new.

(Notes).

1.—“Appointment...Inspectors.”

(1) Analogous provision.

Cf.—S. 3, the Regulation of Railways Act, 1871 (34 and 35 Vic., c. 78).

O

(2) Persons appointed to be Inspectors of Railways.

For —. see Government of India (Railway) Circular No. XV, dated 4th December 1888.

P

2.—“May”

Consulting Engineers.

— for Railways, etc., to be inspecting officers. See Government of India (Railway) Circular No. XV, dated 4th December, 1888.

Q

5. An Inspector shall, for the purpose of any of the duties

Powers of Inspectors 1.

which he is required or authorized to perform under this Act, be deemed to be a public servant² within the meaning of the Indian Penal Code, and, subject to the control of the Governor-General in Council, shall, for that purpose, have the following powers, namely :—

- (a) to enter upon and inspect any Railway or any rolling-stock used thereon ;
- (b) by an order in writing under his hand addressed to the railway administration, to require the attendance before him of any railway servant, and to require answers or returns to such inquiries as he thinks fit to make from such railway servant or from the railway administration ;
- (c) to require the production of any book or document belonging to, or in the possession or control of, any railway administration (except a communication between a railway company and its legal advisers³) which it appears to him to be necessary to inspect.

Old Acts.

Act IV of 1871 ... See S. 5 (d) (1).

Act XVIII of 1854...No corresponding provision.

(Notes).

1.—“ Power of Inspectors.”

Analogous provision.

Cf.—S. 4, the Regulation of Railways Act 1871 (34 and 35 Vic., c. 78). **R**

2.—“ Deemed to be a public servant.”

(1) Public servant defined.

See S. 21, I. P. C. **S**

(2) Offences by, or, relating to public servants.

For—, see Chapter IX, I. P. C. **T**

(3) Contempts of the lawful authority of public servants

For—, see Chapter X, I.P.C. **U**

3.—“ Except a communication... legal advisers ”

Reason for the exception.

In accordance with a suggestion made by one of the railway companies with reference to the draft Bill (Railway) of 1884, communication between railway companies and their legal advisers have been expressly excepted from the documents of which an Inspector of Railways may require production. (See *Statement of Objects and Reasons*). **Y**

6. A railway administration shall afford to the Inspector all reasonable facilities for performing the duties and exercising the powers imposed and conferred upon him by this Act.

Facilities to be afforded to Inspectors.

Old Acts.

Act IV of 1879 ...S. 5 (d) (2).

Act XVIII of 1854...No corresponding provision.

CHAPTER III.

CONSTRUCTION AND MAINTENANCE OF WORKS.

7. (1) Subject to the provisions of this Act and, in the case of immoveable property not belonging to the railway administration, to the provisions of any enactment for the time being in force for the acquisition of land for public purposes and for

Authority of railway administrations to execute all necessary works.

companies ¹, and subject also, in the case of a railway company, to the provisions of any contract between the company and the Government, a railway administration may, for the purpose of constructing a railway or the accommodation or other works connected therewith, and, notwithstanding anything in any other enactment for the time being in force,—

- (a) make or construct in, upon, across, under, or over, any lands, or any streets ², hills, valleys, roads, railways, or tramways
 - or any rivers ³, canals, brooks, streams, or other waters, or any drains, water-pipes, gas-pipes, or telegraph lines, such temporary or permanent inclined planes, arches ⁴, tunnels ⁵, culverts, embankments, aqueducts, bridges ⁶, roads ⁷, lines of railway ⁸, ways, passages, conduits, drains, piers, cuttings, and fences ⁹, as the railway administration thinks proper
- (b) alter the course of any rivers, brooks, streams ¹⁰, or water-courses for the purpose of constructing and maintaining tunnels, bridges, passages or other works over or under them and divert or alter, as well temporarily as permanently, the course of any rivers, brooks, streams, or watercourses, or any roads, streets, or ways, or raise or sink the level thereof, in order the more conveniently to carry them over or under, or by the side of, the railway, as the railway administration thinks proper ;
- (c) make drains or conduits into, through, or under any lands adjoining the railway for the purpose of conveying water from or to the railway ;
- (d) erect and construct such houses, warehouses, offices, and other buildings, and such yards, stations ¹¹, wharves, engines, machinery, apparatus, and other works and conveniences as the railway administration thinks proper ,
- (e) alter, repair, or discontinue such buildings, works, and conveniences as aforesaid or any of them, and substitute others in their stead ; and
- (f) do all other acts necessary for making, maintaining, altering or repairing, and using the railway ¹².

(2) The exercise of the powers conferred on a railway administration by sub-section (1) shall be subject to the control of the Governor-General in Council.

Old Acts.

Act IV of 1879.
Act XVIII of 1854.

} No corresponding provision.

(Notes).

General.

(1) Analogous provision.

This section corresponds to S. 16 of the Railway Clauses Act, 1845 (8 and 9 Vic., c. 20). W

(2) Nature of section.

This section follows generally the terms of an English enactment, but supersedes any local enactments which prohibit the construction of railways over gas-pipes and the like, without the previous permission of Municipal Commissioners. The expense of diverting the course of a railway for the purpose of avoiding a gas pipe, would usually be out of all proportion to any damage which might possibly be caused by the railway passing over the pipe. (See *Statement of Objects and Reasons*) X

(3) Powers conferred.

(a) It confers on railway administrations certain statutory powers; and a statutory power is a power conferred by statute to do something which could not be lawfully done without it. *Ensely v. North-Eastern Ry. Co.*, (1896) 1 Ch. 418 (428). Y

(b) But these powers are to be taken as cut down and qualified by the provision that it must be an act "necessary for making, maintaining, altering or repairing and using the railway" *Pugh v. Golden Valley Ry. Co.*, (1877) 15 Ch. D. 330. Z

(c) See also cl. (f), *infra*. A

(4) Exceeding the statutory powers.

In *Fink v. London and S. W. Ry. Co.*, (1890) 44 Ch. D. 330, a question of — in widening a railway was discussed. B

(5) Section does not introduce, in the case of railways, any special principle.

The — as to injurious affecting, different from that applied in the case of other works. *Att-Gen. and Hare v. Metropolitan Ry. Co.*, (1894) 1 Q. B. 384. C

1.—"Provisions of...companies."

(1) Acquisition of land—Provision.

See the Land Acquisition Act (I of 1894). D

(2) Right of way.

— does not exist on land acquired by a Railway Company under Act VI of 1857, except when the Company, by its own acts lays itself under legal obligation to provide a way. 3 W.R. 27 E

(3) Payment of compensation for damages caused by lawful exercise of powers under this section.

As to —, see S. 10, *infra*. F

2.—"Streets."

(1) Street, meaning of.

(a) The term "street," in its strict sense, is restricted to the roadway and footways. *L.C. and D. Ry. Co. v. Mayor of London*, 19 L.T. 250. G

(b) It also means a thoroughfare with houses on both sides. *Galloway v. Mayor of London*, L.R. 1 H.L. 34. H

2.—“Streets ”—(Concluded).

(2) Right of owner of land adjoining public highway to erect gates.

The owner of land adjoining a public highway, is legally entitled to erect gates or open doors so as to give him access to the highway at any point he pleases, whether the soil of the highway be his or not. *London and North-Western Ry. Co. v. Mayor, etc., of the City of Westminster*, 67 L.T. 93, cited in 25 M. 635 (651). I

3.—“Rivers.”

“Rivers ”—Scope of the term.

Navigable as well as non-navigable rivers are included in this term *Abraham v. G. N. Ry. Co.*, 16 Q.B. 586. J

4.—“Arches.”

Purchase by Railway Company.

Semble.—Land covered by an arch must be purchased by a Railway Company. *Pinchin v. London and Blackwall Ry. Co.*, 24 L.J. Ch. 417. K

5.—“Tunnels.”

* Railway Company to purchase land.

When a Railway Company desires to enter on a certain land in order to have a permanent tunnel constructed, it must purchase the site *Spannow v. Oxford Ry. Co.*, 2 De G. M. and G. 94. L

6.—“Bridges ”

(1) Authority to construct a temporary bridge.

A Railway Company has —, in order to carry earth for constructing an embankment. *London and Birmingham Ry. Co. v. Grand Junction Canal Co.*, 1 Ry. Cas. 224. M

(2) Bridges and inclines.

In addition to the power given by this section to the railway administration, S. 14, *infra*, gives the Governor-General in Council, power to require the administration, at any time, to make over or under-bridges, ascents and descents, and to remove or diminish the danger of level-crossing. (See S. 14 of the Act). N

(3) Railway Company agreeing to make approach to bridge with certain slope.

Where a Railway Company agreed to make the approach to a bridge with certain slope, it was held to the agreement. *Attorney-General v. Mid. Kent, etc., Ry. Co.*, (1867) 3 Ch. 100. O

(4) Line crossing public footpath—Obligation imposed by English Statute.

In *Dartford Rural Council v. Bexley, etc. Ry. Co.*, H. L. (1898) A. C. 210, it was held that the English statute did not impose on a Railway Company, whose line crossed a public footpath, the obligation of carrying the footpath by means of a bridge. P

7.—“Roads.”

A Railway Company diverting road.

(a) A permanent diversion of road can be effected by a Railway Company. *Phillip v. L. B. and S. C. Ry. Co.*, 4 Giff. 46. Q

7.—“Roads” (Concluded).

(b) Such diversion may be to a spot where there is level crossing provided the same is more convenient than a bridge. *Attorney-General v. Ely. and Ry. Co*, L. R. 4 Ch. 194. **R**

(c) Such acts only as are necessary for constructing the Railway or the accommodation of other works connected therewith, can be executed, and not those done merely for the saving of expense. *Reg v. Wycombe Ry. Co.*, L. R. 2 Q. B. 310. **S**

8.—“Lines of railway.”

The words —, were added by the Indian Railways Act, Amendment Act (IX of 1896), S. 1. **T**

9.—“Fences.”

(1) Power to require administration to provide boundary marks.

In addition to the power here given to the Railway administration, S. 13, *infra*, gives the Governor-General in Council power to require the administration to provide boundary marks or fences, works in the nature of screens, gates, chains, bars, etc. **U**

(2) Under English Statute, Railway Company is bound to maintain sufficient fences.

— for the protection of the cattle of the “owners or occupiers” of land adjoining the line. *Dawson v. Midland Ry. Co.*, (1872) L. R. 8 Ex. 8, *Conry v. Great Western Ry. Co.*, (1881) 7 Q. B. D. 322 **V**

(3) Railway Company is not bound in duty to its passengers or other persons to maintain fences

But a —, sufficient to keep cattle off the line in all circumstances, but is bound to use every reasonable care to prevent them from straying upon the line. *Buxton v. North-Eastern Ry. Co*, (1868) L. R. 3 Q. B. 549 *Luxcombe v. Great Western Ry. Co*, (1899) 2 Q. B. 315. **W**

10.—“Rivers, brooks, streams.”

(1) Power conferred by sub-section (1) clause (b).

The — is to be taken as qualified by cl (f), *infra*, and it only authorises a diversion, when the river or road presents an actual obstacle to the construction of the line, and not where the diversion is merely to save expense. *Pugh v. Golden Valley Railway Co.* (1887), 15 Ch. D. 330. **X**

(2) Diversion of stream.

— cannot be effected merely for convenience and economy, *e. g.*, to save the expenses of constructing two bridges. *Pugh v. Golden Valley Ry. Co.*, L. R. 15 Ch. Div. 330. **Y**

(3) Diversion—Company to keep within authority given.

The Company, in making the diversion, must keep within the authority given them. *Queen v. Wycombe Ry. Co.*, (1867) 2 Q. B. 310. **Z**

(4) Diversion of public footpath not permitted.

But, the Statute does not authorise a Railway Company to divert a public footpath, so as to place it on land of which the Company had not acquired the ownership. *Rangeley v. Midland Ry. Co.*, (1868) L. R. 3 Ch. 306. **A**

10.—“*Rivers, brooks, streams*”—(Concluded).(5) **Railway Company diverting a road.**

(a) Where a Railway Company diverted a road *ultra vires*, but with a *bona fide* view to the convenience of the public, a Court of Equity would not compel them to replace the road so as to make their work *ultra vires*, if the result will be to cause greater inconvenience to the public. *Attorney-General v. Ely Haddenham, etc., Ry. Co.*, (1868), L. R. 6 Eq. 106. **B**

(b) On appeal from the above, *held*, that the Company had not exceeded its powers. (*Ibid.*) (1869) 4 Ch. 194. **C**

11.—“*Stations.*”**What constitutes a station.**

A road, platform and steps collectively constitute a station. *Lord Petre v. Eastern Ry. Co.*, 3 Ry. Cas. 367. But see *Eton College v. G. W. Ry. Co.*, 1 Ry. Cas. 200. **D**

12.—“*Do all other acts... railway.*”(1) **Nature of this clause**

This clause is in reality a proviso on the whole section. **E**

(2) **Reason for the above view.**

See *Queen v. Wycombe Ry. Co.* and *Pugh v. Golden Valley Ry. Co.*, *supra*, where it was held that the works authorised by the section must be works “necessary for the making, maintaining, altering, or repairing, and using the railway.” See, also, *Emsley v. North-Eastern Ry. Co.*, (1896) 1 Ch. 418 (434). **F**

(3) **Work convenient on ground of economy.**

(a) Works which are only convenient to a Railway Company on the ground of economy, are not necessary within the meaning of this section. *Fenwick v. East London Ry. Co.*, (1875) L. R. 20 Eq. 544. **G**

(b) Where a Railway wished to build a temporary railway to save the trouble and expense of casting materials from a highway, the mere saving of expense in construction did not constitute necessity. *Morris v. Tottenham, etc., Ry. Co.*, (1892) 2 Ch. 17. **H**

(4) **Railway Company making a line constructing burrow pits.**

A Railway Company, which, in making a line constructs the burrow pits in such a manner as to be continuous, thus acting as channels for water to pass along the line, will be liable if any damage is caused thereby to the owner of land adjacent to the line. 2 Bom. L. R. 537. **I**

(5) **S. 394, Act III of 1888 (Bombay Municipality)—Railway Company storing sleepers on their premises—License from Municipality.**

The G.I.P. Ry. Co., used certain plots of land in Bombay for storing sleepers (timber) for the use of their line. In the Presidency Magistrate's Court, the Company was charged under S. 394 (1) (d), Bombay Act III of 1888, with having used the plots for storing timber without a license from the Municipal Commissioner. *Held*, (1) that no license was necessary as S. 7 (1) of the Act (IX of 1890) enabled the Ry. Co. to do all acts necessary, for making, maintaining, altering or repairing,

12.—“Do all other acts...? railway” —(Concluded).

and using the railway ” notwithstanding anything in any other enactment for the time being in force ; and (2) that the storing of sleepers was necessary for the maintenance, repairing, etc. of the railway line.
11 Bom. L.R. 1181. J

(6) Removal of trees dangerous to or obstructing the working of a railway.

See S. 15, *infra*. K

(7) Acquisition of land—Use for purposes of Acts.

(a) When lands are compulsorily acquired by a Railway Company, they must be used only for purposes mentioned in the Act. *Bostock v. North Staff Ry. Co.*, 3 Sm. and G. 283. L

(b) On a Railway Company erecting a hoarding for preventing the plaintiff from acquiring a right to the access of light across the Railway, the Company was restrained from erecting the same by injunction. *Norton v. L. and N. W. Ry. Co.*, L. R. 9 Ch. D. 623. M

(c) A Railway Company, which had bought land from a man and had covenanted with him in the purchase deed not to erect any building on it to a greater height than eighteen feet within the distance of 80 ft. from certain other property of his, was restrained according to the terms of the covenant. *Lloyd v. London, Chaphan and Dover Ry. Co.*, 2 De G.J. and S 568. N

8. A railway administration may, for the purpose of exercising the powers conferred upon it by this Act, alter the position of any pipe for the supply of gas, water, or compressed air, or the position of any electric

Alteration of pipes,
wires and drains ¹.

wire, or of any drain not being a main drain :

Provided that—

(a) when the railway administration desires to alter the position of any such pipe, wire, or drain, it shall give reasonable notice ² of its intention to do so, and of the time at which it will begin to do so, to the local authority, ³ or company having control over the pipe, wire, or drain, or, when the pipe, wire, or drain, is not under the control of a local authority or company, to the person under whose control the pipe, wire, or drain is ;

(b) a local authority, company, or person receiving notice under proviso (a) may send a person to superintend the work, and the railway administration shall execute the work to the reasonable satisfaction of the person so sent, and shall make arrangements for continuing, during the execution of the work, the supply of gas, water, compressed air, or electricity, or the maintenance of the drainage, as the case may be.

Old Acts.

Act IV of 1879
Act XVIII of 1854 } No corresponding provision

(Notes).

N.B.—See also notes to S. 12, *infra*.

General.

(1) Analogous provision.

Of.—S. 14, the Railway Clauses Act, 1815 (8 Vict. c. 20), and S. 14 (Act III of 1885). 0

(2) Scope of section.

This section confers on a railway administration, a power which the telegraph authority has under the Indian Telegraph Act, 1885 (see *Statement of Objects and Reasons*) P

1 —“Alteration of pipes, wires and drains.”

Payment of compensation for damages caused by lawful exercise of powers under this section.

As to —, see S. 10, *infra*. Q

2.—“Reasonable notice”

(1) Services of notice by railway administration.

For —, see S. 141, *infra* R

(2) Presumption where notice is served by post.

As to —, see S. 142, *infra* S

3.—“Local authority.”

“Local authority.”

—shall mean a municipal committee, district board, body of post commissioners or other authority, legally entitled to, or entrusted by the Government with the control or management of municipal or local fund [S. 3 (28), Act X of 1897]. T

9. (1) The Governor-General in Council may authorize any

Temporary entry upon land for repairing or preventing accident ¹.

railway administration, in case of any slip or other accident happening or being apprehended to any cutting, embankment, or other work under the control of the railway administration, to enter

upon any lands adjoining its railway for the purpose of repairing or preventing the accident, and to do all such works, as may be necessary for the purpose.

(2) In case of necessity the railway administration may enter upon the lands, and do the works aforesaid, without having obtained the previous sanction of the Governor-General in Council, but in such a case shall, within seventy-two hours after such entry, make a report to the Governor-General in Council, specifying the nature of the accident or apprehended accident, and of the works necessary

to be done, and the power conferred on the railway administration by this sub-section shall cease and determine, if the Governor-General in Council, after considering the report, considers that the exercise of the power is not necessary for the public safety.

Old Acts.

Act IV of 1879 }
Act XVIII of 1851 } No corresponding provision.

(Notes).

Analogous provision.

Cf. S. 14, the Railway Regulation Act, 1842 (5 and 6 Vict., c. 55).

U

1.—“Temporary entry... accident.”

Compensation to persons affected by the lawful exercise of powers under this section.

As to—, see S. 10, *infra*.

Y

Payment of compensation for damage caused by lawful exercise of powers under section 7, 8, or 9.

10. (1) A railway administration shall do as little damage¹ as possible in the exercise of the powers conferred by any of the three last foregoing sections, and compensation shall be paid for any damage caused by the exercise thereof.

(2)² A suit shall not lie to recover such compensation, but in case of dispute the amount thereof shall, on application to the Collector, be determined and paid in accordance, so far as may be, with³ the provisions of sections 11 to 15, both inclusive, and sections 18 to 34, both inclusive, and sections 53 and 54 of the Land Acquisition Act, 1894, and the provisions of sections 51 and 52 of that Act shall apply to the award of compensation.

Old Acts.

Act IV of 1879 }
Act XVIII of 1854 } No corresponding provision.

Sub-S. (2) is new.

(Notes).

General.

(1) Analogous provision.

Sub-S. (1) corresponds to the proviso in S. 16 of the Railway Clauses Act, 1845.

W

(2) Source of section.

See Pros. P. W. D. Jan. 1868, Nos. 60 to 64, E.I.Ry.

X

(3) Scope and applicability of section.

(a) This section can only apply to damage which is the result of the exercise of the powers conferred by Ss. 7, 8, and 9 and which can be foreseen.

² Bom. L. R. 357.

Y

General—(Concluded).

- (b) This section does not apply where the power exercised is the erection of an embankment and the making of a culvert which do no injury, but where the sole cause of the injury is that the side trenches of a line are allowed to become water courses; because, this is quite unconnected with the exercise of any power conferred by S. 7, *supra*, and is the result of the negligence that cannot have been foreseen. (*Ibid.*) **Z**

I.—“ Damage.”**(1) Damage caused by exercise of powers conferred by Act.**

“ The statutory tribunal, which the Legislature has provided where losses are sustained in the formation of railways, is only established to give compensation for losses sustained in consequence of what the railway company may lawfully do under the powers which the Legislature has conferred on them, and for anything done in excess of those powers, or contrary to what the Legislature in conferring those powers has commanded, the proper remedy is a common law action in the common law Courts.” (*Caledon Ry. Co v. Coll*, 3 Macq. 833. **A**

(2) Damages caused to adjoining lands.

(a) The owner, whose land is acquired for a railway, should claim for all damages likely to be caused to the adjoining land by the works of the Company. 6 B H C. (A C) 116. **B**

(b) No separate suit will lie for damages so caused, if it could have been reasonably foreseen. (*Ibid*) **C**

(3) Works executed without negligence—Suit for damages, right to maintain.

(a) “ It is quite plain, that, if there had been no proof of negligence and the injury had been the unavoidable result of the proper exercise, by the Railway Company, of the powers vested in it by law, the defendants would have been protected from any civil suit, even if damage had resulted from the exercise of that power.” *Per Ranade, J.* 2 Bom. L. R. 357 (373). **D**

(b) “ The case is, however, altered when the act, which has caused the damage, is not the result of a proper exercise of the powers conferred, but is due to the neglect or carelessness of the Railway Company in the execution of its powers.” (*Ibid.*) **E**

(c) “ The distinction has been well illustrated in the case of accidental fires caused by a spark.” (*Ibid.*) **F**

(d) “ Where the damage done by the spark was not shown to have been the result of negligence the Company was held not to be liable, the reason assigned being that, when the Legislature sanctioned and authorised the use of a particular thing and it is used for that purpose, the sanction carries with it the consequence that, if damage result from it, the Company is not responsible.” (*Ibid.*); *Vaughan v. Taff Ry. Co.*, 5 H. N. 679; 14 B.L.R. 1, F. **G**

(e) “ But, where negligence is proved in the matter of a fire caused by a spark, the damage done was held to be actionable. Action lies even for authorised acts if they are done negligently. If the damage could have been prevented by the reasonable exercise of powers conferred, it was held to be a case in which action could be maintained.” (*Ibid.*) **H**

(f) “ The decision in *Lylands v. Fletcher* (3 H. L. 330) may also be consulted with advantage on this point.” (*Ibid.*) **I**

1.—“Damage!”—(Concluded).

(4) Damage caused by negligence—Civil suit for damages.

Where a Railway Company allowed the rain water to flow for some four miles by the sides of the railway line through gutters made up of the continuous burrow-pits, and then allowed it to discharge itself on to the lands of the plaintiff, the Railway Company was held not to have exercised the powers conferred by S. 7 (l) of the Act and was held liable for negligence. 2 Bom. L. R. 357. J

(5) Action in excess of statutory powers in construction of railway—Suit for damages.

(a) If a person or a body of persons having statutory authority for the construction of works (whether those works are for the benefit of the public or for the benefit of the undertakers, or, as in the case of a railway, partly for the benefit of the undertakers, and partly for the good of the public), exceeds or abuses the powers conferred by the Legislature, the remedy of the person injured in consequence, is by action or suit, and not by a proceeding for compensation under the statute which has been so transferred. 27 B. 344 (352) (P C). K

(b) Powers of this sort are to be exercised with ordinary care and skill and with some regard to the property and rights of others. (*Ibid*) L

(c) They are granted on the condition sometimes expressed and sometime understood—expressed in the Act of 1890, but if not expressed always understood—that the undertakers “shall do as little damage as possible” in the exercise of their statutory powers. (*Ibid*.) [*Lawrence v Great Northern Ry. Co*, (1851) 16 Q. B. 613; *Broadbent v. Imperial Gas Co*, (1857) 7 De G. M. 436; *Baynall v. London and North-Western Ry. Co.*, (1861) 7 H. & N. 423; *Ricket v. Metropolitan Ry. Co.*, (1867) L.R. 21 E. & I. App. 175 (202); *Geddis v. Proprietors of the Burma Reservoir*, (1878) 3 A. C. 430 (455), R] M

(6) Level crossing across a private land, injuriously affecting other property.

A person is entitled to compensation in respect of a Railway Company having made a level-crossing across his private road giving access to his house, if he can show that he sustained damages or loss by it, by reason of his other property having been injuriously affected. 6 C. W. N. 406. N

(7) Acquisition of land for Railway Company—Nuisance caused by the Company.

A Railway Company for whose benefit certain lands were acquired by the Government, for the purpose of erecting workshops, could not justify a nuisance caused by such workshop, on the ground, that it was caused in the reasonable exercise of powers, conferred on them by the Legislature. 10 B.L.R. 241. O

(8) Railway Company not liable for nuisance, when.

(a) NUISANCE DUE TO NECESSARY WORKING OF LINE.

To absolve a Railway Company from liability for a nuisance, the nuisance must be due to the necessary working of the line. *Fenwick v. East London Ry. Co.*, L. R. 20 Eq. 544; *Smith v. Midland Ry. Co.*, 37 L.T. 224. P

(b) ILLUSTRATIONS.

(i) Where a Railway Company worked a mortar mill to make mortar for being used in the construction of the railway, the company will be restrained from working the mortar mill. *Fenwick v. East London Ry. Co.*, L R. 20 Eq. 544. Q

(ii) Likewise, the Company will be restrained from allowing the emission of smoke and noxious vapour from a shed employed for the cleaning of the Engines. *Smith v. Midland Ry. Co.*, 37 L. T. 224. R

(9) Tramway Company, acting under powers conferred by Act of Parliament.

On a—and causing electrical disturbance to plaintiff's wires, held that the company was not liable. *National Telephone Co. v. Baker*, (1899) 2 Ch. 1860. (See 10 B L R 241). S

(10) Railway brought into use—Damage or annoyance.

(a) Where, after the railway is brought into use, damage or annoyance arises from vibration, noise or smoke (no negligence being imputed to the Company), the Company will not be made liable for such damages or annoyance. *Hammersmith & City Ry Co Brand*, L R 4 H L. 171. T

(b) So also damage caused by frightening of horses by passing train will not make the Company liable. *Rex v Pease*, 4 B. & Ad 30. U

(11) Railway Company acquiring land and using it as a dock for cattle traffic.

(a) Where a Railway Company acting under the powers conferred by their special Act, bought some land adjoining one of their stations, and used it as a yard or dock for their cattle traffic, which proved a nuisance to the adjoining occupier owing to the noise of the cattle and their drivers, held that the adjoining occupiers are not entitled to an injunction against the Company. *L. B and S. C Ry Co. v. Truman*, L R. 11 App Cas 45 (See 10 B L R. 241). Y

(b) A similar view has been adopted in the American Courts. 11 C. W. N. 356 (36). W

2.—“Sub-sec (2).”

(1) Interference with private property—Strict compliance with law and authority necessary.

(a) Where the promoters of a public undertaking have authority from Parliament to interfere with private property on certain terms, any person, whose property is interfered with by virtue of that authority, has a right to require that the promoters shall comply with the letter of the appointment, so far as it makes provision on his own behalf. *Hewin v. Rathmines*, (1892) A. C. 498 (523); see, also, *North Star Ry. Co v. Pion*, (1889), 14 App. Cas 612 (629). Cited in 11 C. W. N 356 (363). X

(b) A canal company could not take private property until it had strictly complied with all the requirements of the law, and completed all the steps contemplated therein. *Bennet v. Chesapeake Canal Co.*, 8 Peters 214; *United States v. Ravers*, 70 Fed. Rep. 748, *In re Montgomery*, 48 Fed. Rep. 898, *Bonaparte v. Camden Ry. Co.*, Baldwin 205, 3 Fed. Cas. 821: (cited in 11 C. W. N. 356 (363)). Y

2.—“Sub-section (2)—(Concluded).

(2) Acquisition of land for railway bridge.

(a) When a railway bridge has to be constructed across a river, the bed of which belongs to a private individual, a portion of the river bed under the water has to be acquired and compensation paid for it. 11 C. W. N. 356 (362). [*Thames Conservators v. Pimlico Ry. Co.*, (1868) L. R. 4 C. P. 59, F.] **Z**

(b) But such acquisition will not necessarily interfere with an existing ferry unless the approaches to the ferry are also acquired, in which event the notice ought to specify that the ferry itself is intended to be acquired. (*Ibid.*) **A**

(3) Mere construction of railway bridge.

(a) The taking of property, that merely injures a franchise, but does not interfere with the exercise of it, is not such a taking of property from the owners of the franchise, as to require compensation. 11 C.W.N. 356 (368). **B**

(b) The —across a river, whereby the profits of the ferry are reduced, does not entitle the owners of the ferry to claim damages. (*Ibid.*) **C**

(c) Where, however, lands on both banks of a river which were used as landing places for the ferry were acquired for the purpose of a railway bridge and the access to the river and with it the exercise of the franchise, were destroyed, the owner in consequence became entitled to compensation. (*Ibid.*) **D**

(d) The owner of a ferry cannot maintain an action for loss of traffic, caused by a new highway by bridge or ferry made to provide for a new traffic. *Hopkin v. Great Northern Ry. Co.*, (1877) 2 Q. B. D. 224, referred to in 11 C. W. N. 356 (368). **E**

(4) Suit for compensation in Civil Court

Sub-S (2), S. 10 of the Railways Act does not bar a suit for compensation in the Civil Court, when the Collector refuses to adjudicate on the claim put forward by the owner. 11 C. W. N. 356. **F**

(5) Land taken by Railway Company—Compensation-money, division of.

Compensation money for land taken up by a Railway Company should be divided by the parties entitled to it, in the rate of their respective interests in the land. 18 W.R. 91. **G**

3.—“With the provisions . . . compensation ”

The words and figures comprising the above were substituted by the Indian Railways Amendment Act (IX of 1896). **H**

11. (1) A railway administration shall make and maintain the following works for the accommodation of the owners and occupiers of lands adjoining¹, the railway, namely:—

Accommodation
works.

(a) such and so many convenient crossings, bridges ², arches, culverts, and passages over, under, or by the sides of, or leading to or from, the railway as may, in the opinion of the Governor-General in Council, be necessary for the purpose of making good any interruptions caused by the railway to the use of the lands through which the railway is made, and

(b)³ all necessary arches, tunnels, culverts, drains, watercourses, or other passages, over or under, or by the sides of, the railway, of such dimensions as will, in the opinion of the Governor-General in Council, be sufficient at all times to convey water as freely from or to the lands lying near or affected by the railway as before the making of the railway, or as nearly so as may be.

(2) ⁴ Subject to the other provisions of this Act, the works specified in clauses (a) and (b) of sub-section (1) shall be made during or immediately after the laying out or formation of the railway over the lands traversed thereby, and in such manner as to cause as little damage or inconvenience as possible to persons interested in the lands or affected by the works.

(3) The foregoing provisions of this section are subject to the following provisos, namely:—

(a) a railway administration shall not be required to make any accommodation works in such a manner as would prevent or obstruct the working or using of the railway, or to make any accommodation works with respect to which the owners and occupiers of the lands have agreed to receive, and have been paid compensation in consideration of their not requiring the works to be made;

(b) ⁵ save as hereinafter in this chapter provided, a railway administration shall not, except on the requisition of the Governor-General in Council, be compelled to defray the cost of executing any further or additional accommodation works for the use of the owners or occupiers of the lands after the expiration of ten years ⁹ from the date on which the railway passing through the lands was first opened for public traffic;

- (c) ⁷ where a railway administration has provided suitable accommodation for the crossing of a road or stream, and the road or stream is afterwards diverted by the act or neglect of the person having the control thereof, the administration shall not be compelled to provide other accommodation for the crossing of the road or stream.

(4) The Governor-General in Council may appoint a time for the commencement of any work to be executed under sub-section (1), and if, for fourteen days next after that time, the railway administration fails to commence the work, or, having commenced it, fails to proceed diligently to execute it in a sufficient manner, the Governor-General in Council may execute it, and recover from the railway administration the cost incurred by him in the execution thereof.

Old Acts.

Act IV of 1879 }
Act XVIII of 1854 } No corresponding provision.

Sub-Ss. (2) and (3) (c), are new

(Notes).

General.

(1) Analogous provision.

(a) SUB-S. (1).

— corresponds to S. 68 of the Railway Clauses Act, 1845 (8 and 9 Vic. c. 20). I

(b) SUB-S. (3) (a).

This clause corresponds to the proviso in S. 68 of the Railway Clauses Act, 1845 (8 and 9 Vic. c. 20). J

(c) SUB-S. 3 (b).

This clause corresponds to S. 73 of the Railway Clauses Act, 1845 (8 and 9 Vic. c. 20). K

(d) "SUB-S. 4."

— corresponds to S. 70 of the Railway Clauses Act, 1845 (8 and 9 Vic. c. 20). L

(2) Ss. 11 and 12—Distinction.

(a) The former of the sections (S. 11) imposes on the railway administration the duty, subjected to certain exceptions, of constructing such accommodation works for the use of owners and occupiers of lands, as are proved to be necessary within ten years from the date on which the railway passing through the lands was first opened for public traffic. (See *Statement of Objects and Reasons*). M

(b) Under the latter section (S. 12), an owner or occupier may require any reasonable accommodation work to be constructed by a railway administration at his expense, after the expiration of the ten years. (Ibid.) N

1. — “Works for the accommodation of owners adjoining.”

(1) Scope of section.

(a) The kind of accommodation works that the Railway Company is compellable to give to the land-owner, is defined in this section. *Rhondda and Swansea Ry. Co. v. Talbot*, (1897) 2 Ch. 131. **O**

(b) An absolute and permanent obligation on the Company to make and maintain such works is created by the section. See *Dixon v. Great Western Ry Co*, (1897) 1 Q. B. 300 **P**

(2) Accommodation works.

Clauses (1) (a) and (b) virtually define what the works for the accommodation of the owners and occupiers of lands adjoining are. See 23 B. 358 (367). **Q**

(3) Land-owner is entitled to convenient passage over the railway.

The —, sufficient to make good, so far as possible, any interruption which the construction of the railway causes by severance in the working or use of his land, including any alteration or extension of that working or use, which could or ought to have been contemplated by the parties when the accommodation works were made. *Great Western Ry. Co. v. Talbot*, (1902) 2 Ch. 759 **R**

(4) Lands required for accommodation works

(a) Lands required by a Railway Company for accommodation works are lands required for the purposes of the “undertaking” or of “the railway.” *Wilkinson v. Hull, etc., Ry and Dock Co.*, (1882) 20 Ch. D. 323 **S**

(b) Every work which a Railway Company is empowered to do, not merely what it is compelled to do, is a purpose of the undertaking (*Ibid.*) **T**

(c) See Sub S. (4), *infra*, which ensures that the works should be carried out. **U**

(5) What further works should be made, when there is a difference of opinion

As to —, see S. 12, *infra*. **Y**

(6) “Necessary.”

The word — in the corresponding English section refers to the obligation to make good the interruption. It does not confine the Company to any particular mode of doing the works. *Wilkinson v. Hull, etc., and Dock Co*, (1882) 20 Ch. D. 323. **W**

(7) Several ways of constructing works.

(a) If there happen to be several ways of constructing works, the Railway Company which acts under its Engineer's advice, has the option to choose which method shall be followed, provided they act *bona fide*. (*Ibid.*) **X**

(b) If their action is not *bona fide*, the Court has a right to interfere. (*Ibid.*) **Y**

(8) Effect of the section.

The — is that the opinion of the executive, with reference to the sufficiency of accommodation works, is final 25 C. 632. **Z**

(9) Right to accommodation work—Extinguishment.

(a) There is no duty cast on a Railway Company, which through a land-owner's land, is obliged to make a level crossing, to keep up such accommodation work, when the two parts of the lands, so severed, have passed into the hands of different owners, neither of whom having any right of passing over the other's land. *Mid. Ry Co. v. Gribble*, (1895) 2 Ch. 827. **A**

1.—“Works for the accommodation of owners adjoining” —(Concluded).

- (b) When there is abandonment and final extinguishment of the right to such work, there will be no revival of such right even if the whole of the land afterwards belongs to one owner. (*Ibid.*) **B**
- (10) **Level crossing—Road thereon—Approaches to road—Liability to repair.**
- (a) Both on principle and on authority, “railway companies, ought of right to be bound to repair and keep in repair the highways over level crossings including the approaches on either side thereof” lying outside the gates of the level-crossings. *Hertfordshire County Council v. G. E. Ry. Co.*, (1909) 1 K. B. 361. **C**
- (b) Whenever a body of persons for their own benefit are authorised by statute to cut through a public road, they are bound to do what is necessary to make and maintain and keep an equally convenient passage for the public,—“You are doing no good to the public by repairing the part of the highway within the gates, unless you also repair the part outside, which must be kept up to the same level as the raised part between the gates, so as to enable the public to get on to, and over that raised part, and to use the road as they did before you came across it and created what would otherwise remain an obstruction and a nuisance upon it.” (*Ibid.*) **D**
- (c) Similar is the liability of any public body constructing a bridge over a canal, etc. “You are doing no good at all to the public if you repair two arches in the inside of the stream, and show no way for the public to get at them.” (*Ibid.*) **E**
- (11) **Highway—Obstruction under statutory authority—Railway Company—Level crossing—Approaches, duty of providing—Duty to keep in repair.**
- (a) Where, under a statutory authority, a body of persons have interrupted a public highway, there is a duty imposed on them to make some means of communication for the purpose of restoring the continuity of the highway, and there is also involved a duty on the part of that body to keep the substituted means of communication in repair. *Hertfordshire County Council v. Great Western Ry. Co.*, (1909) 2 K. 403. **F**
- (b) Therefore, where a Railway Company for its own purposes interrupts a highway by some work which renders it impossible for the public to use it, an obligation is imposed upon it to construct such works as may be necessary to restore to the public the use of the highway so interrupted, and the obligation so imposed is of a continuing nature, involving not only the construction of such works, but also their maintenance. (*Ibid.*) **G**

2.—“Bridges.”

(1) Provision re “bridges.”

- (a) The—means a bridge connecting those portions of land of the land-owner served by the railway. *Rhonda and Swansea Ry. Co. v. Talbot*, (1897) 2 Ch. 131. **H**
- (b) It does not refer to any more distant property. (*Ibid.*) **I**

(2) Road carried over railway by means of bridge—Duty of Railway Company.

If a road is carried over a railway by means of a bridge, the Railway Company is bound to keep the roadway in repair as part of the bridge. *Lancashire, etc., Ry. Co. v. Mayor, etc., of Busby*, (1889) 14 App. 417. **J**

3.—“ *Sub-S. (1) (b).* ”(1) **Sub-S. (1) (b)—Scope and effect.**

(a) “ Under this section, the purpose for which the accommodation works are to be constructed, is to convey water as freely as before, from or to certain lands and the aggrieved person is the owner of those lands. ”
2 Bom. L.R. 357. K

(b) “ There is, however, no provision in the Act for the recovery of compensation for damage caused by the construction or non-construction of the works enumerated in the section. ” (*Ibid.*) But see (S. 7 (1) wherein reference is made to the construction of “ accommodation or other works ”). L

(c) “ If therefore persons who own lands other than those mentioned in the section are injured, their remedy must be the ordinary one by suit, and there is nothing in the Act which bars this remedy. ” (*Ibid.*) M

(d) “ There can be still less any bar to a suit in which the plaintiff alleges and proves injury, not so much by the construction or non-construction of accommodation works as by the construction of the railway line itself generally, and especially by negligence in that the line was allowed to become a channel for discharging on his land water which before the construction never came near it. ” (*Ibid.*) N

(2) **Duty of Railway Company to construct drains, etc.**

A Railway Company is bound to construct drains and other water passages sufficient to convey away the water that would otherwise be dammed up by embankments, and be probably thrown back on the adjoining lands.
London and N.W. Ry. Co. v. Runcorn Rural Council. (1898) 1 Ch. 34. O

(3) **Nature of such drains.**

But such drains and water-courses are to be such as are required at the time when the land was taken, and not such as might be necessary at a subsequent time when the land might be applied to uses of a totally different kind. *R. v. Fisher*, (1862) 3 B. and S. 191. P

(4) **Construction of line—Neglect of Railway Company—Liability.**

Although a Railway Company constructs its line according to the provisions of its Act, it will be taken to task if an unforeseen injury arises through its mode of constructing the railway. *Lawrence v. G. N. Ry. Co.*, 16 Q.B. 643 (but see, *Colley v. I. and N.W. Ry. Co.*, L.R. 5. Ex. Div. 277). Q

(5) **Compensation for damage caused by railway works—Suit to enforce construction of a channel to irrigate land.**

Where the plaintiff, who alleged that the execution of certain works by a railway company under S. 7 of the Act, had interfered with his right to the flow of water to his land, did not suggest that the company had exceeded powers conferred on them by that section, but claimed that they had failed to discharge the obligation imposed by S. 11 (b) of the Act to make the necessary accommodation works, and sought a decision of the Court that such works should be executed, held that he had no right of action. 25 C. 632. R

4.—“*Sub-S. (2).*”

(1) What kind of accommodation works required?

Accommodation works which a company may be required to make, are such accommodation works as are required at the time the land is taken, having regard to its then use and not accommodation works which may be required when the character of the land and perhaps the nature of the neighbourhood is entirely altered years afterwards, *i.e.*, the works must refer to the present use and exigencies of the land at the time of the interruption and not to the prospective use of it. *R. v. Fisher*, (1862) 3 B. and S. 191. S

(2) Land used for agriculture, having prospective value for building purposes—
Compensation tribunal, mode of valuation by.

When lands used for agriculture have a prospective value for building purposes, the compensation tribunal, value it as building land, should estimate the damages for severance, as if access had been cut off, because, accommodation works could only be ordered in reference to the land as then used for agriculture, and these would be useless as an access to building land. *R. v. Brown*, (1867) L.R. 2 Q.B. 630. T

(3) Level-crossing—Land-owner not entitled to increase burden of easement

A land-owner, for whose tramway over the line a Company has provided a level crossing, cannot increase the burden of the easement afterwards, by altering or enlarging its character, nature or extent. *Great Western Ry. Co. v. Talbot*, (1902) 2 Ch. 759. U

5.—“*Sub-S. 3 (b).*”

(1) Meaning of Sub-S. (3).

- (a) With railways under construction, a land-owner may not at first be fully cognizant of the amount of inconvenience which may be caused to his land by the interposition of the railway between certain different parts of it. See *Rhondda and Swansea Ry. Co. v. Talbot*, (1897) 2 Ch. 131. V
- (b) And so, he is allowed time, *viz.*, 10 years, for consideration and determination in order, if necessary, that he may make further application and obtain further accommodation works than those which were originally asked for. (*Ibid.*) W

(2) Scope of clause (3) (b).

- (a) This clause expressly deals with “further or additional works.” *Dixton v. Great Western Ry. Co.*, (1897) 1 Q.B. 300. X
- (b) If no accommodation works have been made, there cannot be further or additional works. (*Ibid.*) Y

(3) Objection not taken in due time.

If an owner of land does not object to the sufficiency of a culvert till after more than the prescribed period, no action would lie. *Colley v. London and N.W.Ry. Co.*, (1880) 5 Ex. D. 277. Z

6.—“*Years.*”

“*Year.*”

—shall mean a year reckoned according to the British calendar. (See S. 3 (59), (Act X of 1897, General Clauses Act). A

7.—“Sub-S. (3) (c).”**Sub-S (3) (c), how introduced.**

Suggested at Railway Conference, 1888.

B**12. If an owner or occupier of any land affected by a railway**

Power for owner, occupier or local authority to cause additional accommodation works to be made 1.

considers the works made under the last foregoing section to be insufficient for the commodious use of the land, or if the Local Government or a local authority desires to construct a public road or

other work across, under or over a railway, he or it, as the case may be, may at any time require the railway administration to make at his or its expense such further accommodation works ² as he or it thinks necessary and are agreed to by the railway administration or as, in case of difference of opinion, may be authorised by the Governor-General in Council.

Old Acts

Act IV of 1879.

Act XVIII of 1854.

No corresponding provision.

(Notes).**(1) Analogous provision.**

This section corresponds to S. 71 of the Railway Clauses Act, 1845 (8 and 9 Vict. c. 20).

C**(2) Ss. 11 and 12 are modifications of Ss 68 and 71, Railway Clauses Consolidation Act 8 and 9 Vic. c 20.**

—, though S 71 (of the English Act) refers only to owners and occupiers, and not to local authorities desiring to construct public works. 23 B. 358.

D**(3) Ss. 11 and 12—Distinction**See under S 11, *supra***E****1 —“Power for owner....made.”****(1) Object of the section.**

The whole object of the section is to deal with certain accommodation works considered to be insufficient—insufficient, not at any future time, but at the time of the construction of the works. 23 B. 358.

F**(2) Purport of the section.**

(a) The section does not mean that, if a change takes place in the nature of the property, accommodation works are to be authorised such as would be convenient and commodious in the altered state of things, but which would never have been considered necessary or convenient in the state of things which existed at the time when the works were constructed. (*Ibid.*)

G

(b) It does not enable the land owner to make any works he thinks proper at any time for the commodious use of his land. (*Ibid.*)

H

(c) It does not mean that, when nothing has been done or ordered at the time, he can do what he likes under it when the whole nature of the property has been changed. (*Ibid.*)

I

1.—“Power for owner...made”—(Concluded).

(d) It only authorises the construction of such accommodation works as might have been required under S. 68 of the English Act (corresponding to S. 11 of this Act). (*Ibid.*) **J**

(e) And before he can invoke it, the conditions expressed in the early part of it must exist. (*Ibid.*) **K**

(3) Nature and applicability of the section—Local authority, rights and powers of.

(a) This section is inapplicable unless accommodation works have been made or ordered. *Rhondda and Swansea Ry. Co. v. Talbot*, (1897) 2 Ch 181. **L**

(b) S 12 is purely enabling and permissive, and not prohibitive. *Per Strachey, J*, in 28 B 358 (366) **M**

(c) It gives a particular right to a local authority as against a railway administration, but does not thereby impliedly abolish any independent right vested in the local authority by any other enactment. (*Ibid*) **N**

(d) The provisions of this section would only be obligatory on a local authority desiring further accommodation works and not having any independent power, such as the power created by Act III of 1888 (*Bombay Municipal*) for the purpose (*Ibid*) **O**

(e) That the view is correct follows from the wording of this section, which in terms only confers a power on the local authority and does not purport to take away any other power or duty existing *abunde* (*Ibid*) **P**

(f) There is nothing inconsistent with it in S 8, *supra*. **Q**

(g) It is reasonable enough that a local authority should be empowered, subject to certain conditions and for the purposes of its own Act, to lay pipes under railway as well as under other land, and that, nevertheless, the railway administration should be authorised for the purpose of exercising the powers conferred upon it by Act IX of 1890 to alter the position of any such pipe, subject to the local authority's superintendence. (*Ibid.*) **R**

(h) In the case of a local authority desiring to construct a public road or other work across, under or over a railway, the accommodation works required, must obviously be works other than the public work to be constructed. 23 B 358 (367). **S**

(i) There must be first, a public work whose construction is desired by the local authority and secondly, works required to be made for its commodious use. (*Ibid.*) **T**

(j) A local authority desiring to make only a public road cannot require the railway administration to make the road as an accommodation work (*Ibid.*) **U**

(k) What the local authority may require the railway administration to make, is not the road or other public work, but accommodation works for its commodious use. (*Ibid.*) **Y**

(l) The public work itself must be made by the local authority under some other statutory power. (*Ibid.*) **W**

2.—“Further accommodation works.”

(1) “Further accommodation works.”

(a) It is not “accommodation works” simply but “further accommodation works” that S. 12 provides for. 23 B. 358 (367). **X**

(b) (i) The “further accommodation works” must mean the same thing throughout the section. (*Ibid*) **Y**

(ii) That expression must have the same meaning whether the requisition to the railway administration is made by the owner or occupier mentioned in the opening words of the section, or by the Local Government or a local authority. (*Ibid*) **Z**

(c) The word “further” in itself, and also in connection with opening words, obviously has reference to S. 11, *supra*, to which S. 12 is a rider, and in which the term “accommodation works” is virtually defined. (*Ibid*) **A**

(d) It has been held that the “further” works contemplated by S. 71 of the English Act (corresponding to this section) do not mean any kind of works which would at any time be convenient for the landowners, but works additional to accommodation works already made by the Railway Company under S. 68 of the English Act (corresponding to S. 11, *supra*), and of the same kind as those which might be required under that section. *Rhondda and Swansea Ry Co v. Talbot*, (1897) 2 Ch. 131, cited in 23 B. 358 (367) **B**

(2) Ss. 222—265, Bombay Act III of 1888 (Municipal)—Right to enter on premises of Railway Company to lay pipes, etc

(a) According to Bombay Act III of 1888 (Municipal), the Municipal Corporation of Bombay, for supplying the city with water, can enter on land belonging to others, make connections between the mains, and lay the pipes forming the connections through, or under such lands without the owner's permission, though not without giving them reasonable notice in writing 23 B. 358 **C**

(b) This section does not exclude the above right of the Bombay Corporation to enter on land belonging to the G I P Ry Co., to make the connections proposed (*Ibid*) **D**

13. The Governor-General in Council may require that, within a time to be specified in the requisition or within such further time as he may appoint in this behalf,

Fences, screens,
gates and bars

(a) boundary-marks or fences¹, be provided or renewed by a railway administration for a railway or any part thereof and for roads constructed in connection therewith;

(b) any works in the nature of a screen², near to or adjoining the side of any public road constructed before the making of a railway be provided or renewed by a

railway administration for the purpose of preventing danger to passengers on the road by reason of horses or other animals being frightened by the sight or noise of the rolling-stock moving on the railway ;

(c) suitable gates, chains, bars, stiles or hand-rails ³ be erected or renewed by a railway administration at places where a railway crosses a public road on the level ;

(d) persons be employed by a railway administration to open and shut such gates, chains or bars ⁴.

Old Acts.

Act IV of 1879	S. 52.
„ XVIII of 1864	S. 21.

(Notes).

General.

(1) Analogous provision.

(a) "SUB-S. (a) "

Cf.—S. 10 of the Railway Regulation Act, 1842 (5 and 6 Vic., c. 55). E

(b) SUB-S. (b).

Cf.—S. 63, the Railway-Clauses Act, 1845 (8 and 9 Vic., c. 20).

(c) SUB-S. (c).

Cf.—S. 9, the Railway Regulation Act (5 and 6 Vic., c. 55)

(d) "SUB-S. (d) ".

Cf.—S. 48, the Railway Clauses Act, 1845, (8 and 9 Vic., c. 20). H

(2) Sources of section.

U. O. Register No. 2360 of 1881,

Pros., P. W. D., May 1866, Nos. 12 to 17,

————— Jan. 1868, Nos. 62 to 64,

————— Oct. 1869, Nos. 318 to 343.

————— June 1874, Nos. 11 and 12 I

(3) Scope of section

(a) This section provides for the erection of fences in pursuance of express requisition by the Governor-General in Council, instead of under rules which can hardly be so drawn as to be applicable to all cases. (See *Statement of Objects and Reasons*). J

(b) It also empowers the Governor-General in Council to require the construction of screens in places, where there is danger of horses being frightened by the sight or noise of rolling-stock moving on a Railway. (*Ibid.*) K

I.—“Fences.”

(1) **Obligation of Railway Company to erect fence.**

Unless required by the Governor-General, a Railway Company is not bound to erect a fence. See *Conder v. Ballaprasad*, Bombay Printed Judgments, 1896, p. 92. **L & M**

(2) **Rules for fencing.**

As to —, see G. O. No. 908, Public Works Department, 6th April 1875. **N**

(3) **Rules for the demarcation of the lands.**

As to —, permanently occupied for the use of Railways in India. See Government of India (Railway) Circular No. XIV, dated 6th Aug. 1890. **O**

(4) **Fence to ward off cattle.**

(a) It is only to ward off the cattle of the owners and occupiers of the adjoining lands, a Railway Company is bound to keep up the fences. *M. S. and L. Ry. Co. v. Wallis*, 14 C. B. 243. **O 1**

(b) The obligation to make and maintain fences for preventing cattle straying on the line is absolute as between a Railway Company and the owners and occupiers of the adjoining lands. *Buxton v. N. E. Ry. Co.*, L.R. 3 Q. B. 549. **P**

(c) A person, who, with the permission of the owner of the soil over which a highway adjoining a Railway passes, allows his cattle to stray on the highway, cannot be regarded as an owner or occupier of the adjoining lands. *Laurcombe v. Great Western Ry. Co.*, (1899) 2 Q. B. 313. **Q**

(5) **Liability of Railway Company.**

Where a horse strayed from a road on to the line through the gate-yard, the yard not being fenced off the line, and was damaged, held, that the Railway Company was liable. *Midland Ry. Co. v. Daykin*, 17 Q.B. 126. **R**

(6) **Non-liability of Railway Company.**

(a) Where cattle trespass on lands adjoining the fence and belonging to the Railway Company, and the lands are damaged, through the defective condition of the fence the Railway Company cannot be held liable. *Marsfell v. South Wales Ry. Co.*, 29 L. J. C. P. 315. **S**

(b) So, also, for damage caused to cattle brought to a station by a Railway, owing to their having strayed from the yard on to the line, the yard not being fenced off from the line. *Roberts v. G. W. Ry. Co.*, 27 L. J. C. P. 266. **T**

(c) So, also, for injuries caused to a passenger through a train coming into contact with a bullock straying on the line, it being proved, that the fences have been kept in good condition. *Buxton v. N. E. Ry. Co.*, L. R. 3 Q. B. 549. **U**

(7) **Obligation to fence as towards those off the line**

Though a Railway Company is not bound to fence the line as towards passengers or those already on the line, yet a duty is cast on it, to fence as towards persons off the line for the purpose of preventing them from getting on to or straying on, the line. *Harrold v. G. W. Ry. Co.*, 14 L. T. 440. **V**

2.—“Screen.”

(1) Duty of Railway Company to erect screen.

A Railway Company is not bound to erect a screen unless required to do so by the Governor-General in Council. In the absence of evidence to establish an obligation on the part of a Railway Company to screen the Railway from the road, the Railway Company will not be held responsible to a plaintiff receiving injuries while leaving a station, through a horse in his carriage being frightened by the sight and sound of a locomotive engine at the station which was blowing off the steam. *Simkin v. L. and N. W. Ry. Co.*, L. R. 21 Q. B. D. 453. **W**

(2) Level crossing—Blowing off steam—Frightening of horse.

Where horses waiting to pass over the line at a level crossing are frightened by the blowing off of steam, *held*, that such an act amounts to culpable negligence on the part of the Railway Company. *Manchester South Junction Ry. Co. v. Millerton*, 14 C. B. (N S) 54. **X**

3.—“Gates....hand-rails”

(1) Evidence of negligence.

Knowledge of the Railway Company that a gate is out of repair is ——. *Brooks v. L. and N. W. Ry. Co.* 33 W. R. 167. **Y**

(2) Gates allowed to be left open.

(a) Failure to keep the gates of a level crossing closed, at the time a train passes, renders the Company liable. *N. E. Ry. Co. v. Wanless*, L. R. 7 H. L. 12. **Z**

(b) So, also, the permitting of persons on the line. (*Ibid.*) **A**

(c) Similarly, if the gate serves for a private road in addition to the public road. *Lunt v. L. and N. W. Ry. Co.*, L. R. 1 Q. B. 277. **B**

(d) So, also, the leaving of a swing-gate at a level crossing partially open. *Stapley v. L. B. and S. C. Ry. Co.* (1965) L. R. 1 K. 21. **C**

(3) Insufficiency of fence adjoining gate.

Where a fence adjoining a gate belonging to a level foot-path crossing the line is found to be insufficient, and as a result of this insufficiency some horses are killed, *held*, that the Railway Company is liable. *Charman v. S. E. Ry. Co.*, 57 L. J. Q. B. 597. **D**

(4) Porter informing plaintiff not to cross the line—Injury—Liability of Company.

Where, notwithstanding the protest of a porter not to cross the line, a plaintiff sustains injuries at night in going over a public footpath crossing a railway on the level, *held*, that there was no negligence on the part of the Company. *Ellis v. G. W. Ry. Co.*, L. R. 9 C. P. 551. **E**

(5) Accident while crossing a level crossing—Omission of person injured to take reasonable care.

Where accident to a person crossing a level crossing was brought about by his own omission to take such care as any reasonable man would use, *held*, that the Railway Company would not be liable for damage caused to him. *Davey v. L. and S. W. Ry. Co.*, L. R. 12 Q. B. D. 70. But see *Brown v. G. W. Ry. Co.*, 52 L. T. 622. **F**

(6) Level crossing—Company bound to repair.

It is the duty of a Railway Company to keep the road on a level crossing in repair, suitable for ordinary and regular traffic. *Oliver v. N. E. Ry. Co.*, L. R. 9 Q. B. 409. **G**

(7) Person crossing line by path at station end—Evidence of negligence.

(a) A Company can be said to be guilty of culpable negligence, if a passenger in crossing the line by a path at the end of a station—the path being allowed to be used by the passengers—is knocked down and killed by a passing train. *Rogers v. Rymney Ry. Co.*, 26 L. T. 879. **H**

(b) But not so, if the plaintiff could have crossed the line by going over a bridge outside the station, and if the railway officials did not invite the plaintiff to cross the line where he did *Wilby v. Midland Ry. Co.*, 35 L. T. 244. **I**

(8) Company permitting persons to cross the line otherwise than by level crossing.

A Railway Company allowing persons to cross the line otherwise than by a level-crossing, is not in duty bound to use care to protect such persons. *Harrison v. N. E. Ry. Co.*, 29 L. T. 844 **J**

(9) Notices of warning not given effect to

When notices warning persons against crossing the line at a particular spot, have been disregarded by the public and not enforced by the Railway officials, the Company cannot set up the existence of such notices in reply to a suit for damages *Sublin, Wicklow and Weaford Ry. Co. v. Slattery*, L.R. 9 C. P. 551 **K**

(10) Right of way on Railway level-crossing—Obstruction—Injunction

Where a Railway Company closed a gateway at a level-crossing of the railway through which there was a public right of way, a person who had suffered special damage by the obstruction would be entitled to an injunction. 10 B. 390 **L**

(11) Persons crossing line at place where there is no right of way.

Where persons cross a railway line at a certain place, the Company has to take reasonable precautions in the use of that spot, even though there is no right of way there *Barnet v. Midland Ry. Co.*, 1 F. and F. 361 **M**

(12) Road and foot path crossing rail road by level-crossing—Absence of gate or stile

The fact of the absence of gate or stile at a place where a road and a foot path crossed a rail road by a level crossing, and the fact of a child being found with its foot cut off on the railway close to the footpath crossing, would be sufficient to render the Company liable. *Williams v. G. W. Ry. Co.*, L. R. 9 Ex. 127. **N**

4 —“Persons....bars.”**(1) Omission to keep a gate keeper.**

The fact of a Railway Company's negligence cannot be inferred from its—on the level. *Glegg v. Midland Ry. Co.*, L. R. 5 Q. B. 258 **O**

(2) Watchman at a footpath level-crossing.

(a) There is no general obligation on a Railway Company to keep a—
Stubley v. L. and N. W. Ry. Co., L. R. 1 Ex. 13 **P**

(b) But, whether such omission can be regarded as negligence on the part of Railway Company, depends on the circumstances of the case. (*Ibid.*) **Q**

4 —“ Persons . . . bars ”—(Concluded).

(3) Gates of a level-crossing closed—Right to open.

(a) Under the English law, when a person finds the gates of a level-crossing closed, he is not entitled to open them. *Wyatt v. G. W. Ry. Co.*, 6 B. and S. 709 (But see S. 124, *infra*). **R**

(b) The same is the case even if there is no gate-keeper present (*Ibid*) **S**

14. (1) Where a railway administration has constructed a railway across a public road on the level, the Governor-General in Council may at any time, if it appears to him necessary for the public safety, require the railway administration, within such time as he thinks fit, to carry the road either under or over the railway by means of a bridge or arch, with convenient ascents and descents and other convenient approaches, instead of crossing the road on the level, or to execute such other works as, in the circumstances of the case, may appear to the Governor-General in Council to be best adapted for removing or diminishing the danger arising from the level-crossing.

(2) The Governor-General in Council may require, as a condition of making a requisition under sub-section (1), that the Local authority, if any, which maintains the road shall undertake to pay the whole of the cost to the railway administration of complying with the requisition or such portion of the cost as the Governor-General in Council thinks just.

Old Acts.

Act IV of 1879.	} No corresponding provision.
Act XVIII of 1854.	

(Notes).

General

(1) Analogous provision.

(a) “ SUB-S. (1) ”.

Cf.—S. 7, the Railway Clauses Act, 1863 (26 and 27 Vic., c. 92). **T**

(b) “ SUB-S. (2). ”

Cf.—S. 46, the Railway Clauses Act, 1845 (8 and 9 Vic. c. 20); and S. 16, the Railway Canal and Tariff Act, 1898 (51 and 52 Vic., c. 25). **U**

(2) Nature and scope of section.

This section reproduces the substance of S. 7 of the Railway Clauses Act, 1863, and, following S. 16 of the Railway and Canal Tariff Act, 1898, reserves to the Governor-General in Council power to require, as a condition of an order being made on a railway administration for the construction of works at a level-crossing, that the local authority, if any, which maintains the road crossed on the level, shall undertake to pay the whole or a fair share of the cost of the works. (See *Statement of Objects and Reasons*.) **V**

1.—“Over and under bridges.”**(1) Option of Railway Company.**

(a) Under S. 46, of the Railway Clauses Act, 1845 (*Cf.* present section), it is left to the option of the Company to carry the railway over the road, or the road over the railway. *Reg. v. S. E. Ry. Co.*, 4 H.L. Cas. 471. **W**

(b) Unless the impossibility to exercise the option is exhibited, the Court will not grant a *mandamus* for compelling the Company to exercise the option for carrying out one of these Courses. (*Ibid.*) **X**

(2) Carrying a public footpath over a railway or the railway over a footpath.

There is no obligation imposed on a Railway Company under S. 46 of the Railway Clauses Act, 1845 (*Cf.* the present section) for—, *Dartford Rural Council v. Beasley Heath Ry.*, (1898) App. Cas. 210. **Y**

(3) Overbridges—Repairs.

On the construction of an over-bridge under S. 16, the Railway Clauses Act, 1845 (*Cf.* present section), it is the duty of the railway Company to keep the bridge, with its approaches and the roadway on the bridge, in repair. *L. and Y. Ry. Co. v. Mayor of Bury*, L. R. 14 App. Cas. 417. **Z**

(4) Railway Company not liable to repair.

The Railway Company is not liable, in the case of the level of a highroad being lowered for carrying the railway over a bridge, to repair the slope of the road as being an approach to the bridge. *L. and N.W. Ry. Co. v. Sherton*, 5 B. and S. 559. **A**

(5) Construction of bridge in lieu of level crossing—Want of funds—Effect.

When a Railway Company suffers from want of funds, and as such is not in a position to construct a bridge in lieu of a level-crossing, the Company will not be compelled to construct the bridge *In re Bristol and North Somerset Ry. Co.*, L.R. 3 Q.B.D. 10. **B**

Removal of trees dangerous to or obstructing the working of a railway.

15. (1) In either of the following cases, namely :—

(a) where there is danger that a tree standing near a railway may fall on the railway so as to obstruct traffic,

(b) when a tree obstructs the view of any fixed signal, the Railway-Administration may, with the permission of any Magistrate, fell the tree or deal with it in such other manner as will in the opinion of the Railway-Administration avert the danger or remove the obstruction, as the case may be.

(2) In case of emergency the power mentioned in sub-section (1) may be exercised by a Railway Administration without the permission of a Magistrate.

(3) Where a tree felled or otherwise dealt with under sub-section (1) or sub-section (2) was in existence before the railway was constructed or the signal was fixed, any Magistrate may, upon the application of the persons interested in the tree, award to those persons such compensation as he thinks reasonable.

(4) Such an award, subject, were made in a presidency-town by any Magistrate other than the Chief Presidency Magistrate or where made elsewhere by any Magistrate other than the District Magistrate, to revision by the Chief Presidency Magistrate, or the District Magistrate, as the case may be, shall be final.

(5) A Civil Court shall not entertain a suit to recover compensation for any tree felled or otherwise dealt with under this section.

Old Acts.

Act IV of 1879. }
Act XVIII of 1854 } No corresponding provision.

(Notes).

(1) Analogous provision.

Cf.—S. 24, the Regulation of Railways Act, 1868 (31 and 32 Vic., c. 119).

S. 18, Act III of 1885 (The Indian Telegraph Act, 1885).

C

(2) Object of section.

In permitting a railway administration to act in a case of emergency without the permission of a Magistrate, and so going beyond the provisions of the corresponding provision of the Indian Telegraph Act, 1885, this section confers a power which it is deemed essential that the railway authorities should possess. (See *Statement of Objects and Reasons.*) **D**

CHAPTER IV.

OPENING OF RAILWAYS.

16. (1) A railway administration may, with the previous sanction of the Governor-General in Council, use upon a railway locomotive engines or other motive power, and rolling-stock to be drawn or propelled thereby.

Right to use locomotives ¹.

(2) ² But rolling-stock shall not be moved upon a railway by steam or other motive power until such general rules for the railway as may be deemed to be necessary have been made, sanctioned and published under this Act.

Old Acts.

Act IV of 1879 .. Sub-S. (1) of present Act corresponds to S. 4 of Act IV of 1879.
Act XVIII of 1854.. No corresponding provision.

Sub-S. (2) is new.

(Notes).

N.B.—See notes under S. 10, *supra*.

E

General.

(1) Analogous provision.

Cf.—S. 86, the Railway Clauses Act, 1845 (8 and 9 Vic., c. 20).

F

(2) Notification sanctioning the use of motive power and rolling-stock on railways.

For—in,

(a) Assam, see Gazette of India, 1883, Pt. I, p. 21 ;

—————, 1885, Pt. I, p. 588 ;

—————, 1893, Pt. I, p. 178 ;

G

(b) Bengal (including districts now under Eastern Bengal and Assam),

see Gazette of India, 1879 ; Pt. I, p. 428.

—————, 1880, Pt. I, p. 21.

—————, 1884, Pt. I, p. 322.

—————, 1885, Pt. I, p. 148, etc.

H

(c) Bombay, see Bombay Rules and Orders, Vol. I.

I

(d) Burma, see Burma Rules Manual, Vol. I.

J

(e) Central Provinces, see Gazette of India, 1885, Pt. I, p. 683.

K

(f) Madras, see Madras Rules and Orders, Vol. I.

L

(g) United Provinces of Agra, and Oudh,

see Gazette of India, 1879, Pt. I, p. 428 ;

—————, 1884, Pt. I, p. 322 ;

—————, 1893, Pt. I, p. 396 ,

M

(h) The Punjab, see Punjab list of Local Rules and Orders ,

Gazette of India, 1879, Pt. I, p. 428 ;

—————, 1884, Pt. I, p. 322 ,

—————, 1885, Pt. I, p. 588 ;

N

1.—“ Right to use locomotives.”

(1) Right to use locomotive engines.

The—must be in express terms in order to entitle the Company to protection.

Jones v. Festiniog Ry. Co., L.R. 3 Q B. 733.

O

(2) Fire caused by spark from engine—Action for damages—Liability of Company.

See *Vaughan v. Taff Vale Ry Co* , 3 H. and N 679 , 14 B.L.R. 1, noted under S 10, *supra*.

P

(3) Fire from sparks—Onus.

(a) The fact that property is destroyed by fire caused by sparks from an engine is *prima evidence* of negligence on the part of the Railway Company.

I ugot v. Eastern Ry Co., 3 C B 229

Q

(b) In that case the Company is bound to show that precautions had been adopted for preventing accidents. (*Ibid*)

R

(c) But in *Port Glasgow & Co v. Cal. Ry. Co.*, H.L.R. (1893), W.N. 29, the *onus* was shifted on the appellants for proving that the Railway Company was negligent.

S

(4) Engines passing on railway—Horses frightened—Liability of Railway Company.

If engines pass on a Railway Constructed under statutory powers and horses are frightened, the Railway Company will not be held liable. *Rex v. Pease*, 4 B and Ad. 80.

T

See in this connection *Manchester South Junction Co. v. Fullarton*, 14 C.B. (N.S.) 54, noted under S. 13, *supra*.

U

2.—“Sub-Section 2.”

Sub-S. (2), designed for what purpose.

S. 16, Sub-S. (2), is designed to prevent the recurrence of the very serious accidents which have from time to time occurred from the unregulated use of locomotive power on railways under construction. See (*Statement of Objects and Reasons*). **Y**

17. (1) Subject to the provisions of sub-section (2), a railway administration shall, one month¹ at least before it intends to open any railway for the public carriage of passengers, give to the Governor-General in Council notice in writing of its intention.

Notice of intended opening of a railway.

(2) The Governor-General in Council may in any case, if he thinks fit, reduce the period of, or dispense with, the notice mentioned in sub-section (1).

Old Acts.

Acts IV of 1879 ... S. 5 corresponding to sub-S. 1 of the present Act.

„ XVIII of 1854 ... No corresponding provision.

Sub-S. (2) is new.

(Notes).

1.—“Month.”

“Month,” meaning of.

“Month” shall mean a month reckoned according to the British Calendar. See Ss. 3 (33) and 4 (1) General clauses Act (X of 1897) **W**

Sanction of the Government a condition precedent to the opening of a railway.

18. A railway shall not be opened for the public carriage of passengers until the Governor-General in Council, or an Inspector empowered by the Governor-General in Council in this behalf has by order sanctioned the opening thereof for that purpose.

Old Acts.

Act IV of 1879 ... S. 5.

„ XVIII of 1854 ... No corresponding provision.

(Note).

General.

Source of section.

See Pros., P. W. D. Jan., 1868, Nos. 60 to 64, E. I. R. 29-32

X

19. (1) The sanction of the Governor-General in Council under the last foregoing section shall not be given until an Inspector has, after inspection of the railway, reported in writing to the Governor-General in Council—

Procedure in sanctioning the opening of a railway.

- (a) that he has made a careful inspection of the railway and rolling-stock ;
- (b)¹ that the moving and fixed dimensions prescribed by the Governor-General in Council have not been infringed ;
- (c) that the weight of rails, strength of bridges, general structural character of the works, and the size of and maximum gross load upon the axles of any rolling-stock are such as have been prescribed by the Governor-General in Council ;
- (d) that the railway is sufficiently supplied with rolling-stock ;
- (e) that general rules for the working of the railway when opened for the public carriage of passengers have been made, sanctioned and published under this Act ; and
- (f) that, in his opinion, the railway can be opened for the public carriage of passengers without danger to the public using it.

¹ (2) If, in the opinion of the Inspector, the railway cannot be so opened without danger to the public using it, he shall state that opinion together with the grounds therefor to the Governor-General in Council, and the Governor-General in Council may thereupon order the railway administration to postpone the opening of the railway.

(3) An order under the last foregoing sub-section must set forth the requirements to be complied with as a condition precedent to the opening of the railway being sanctioned, and shall direct the postponement of the opening of the railway until those requirements have been complied with or the Governor-General in Council is otherwise satisfied that the railway can be opened without danger to the public using it.

(4) The sanction given under this section may be either absolute or subject to such conditions as the Governor-General in Council thinks necessary for the safety of the public.

(5) When sanction for the opening of a railway is given subject to conditions and the Railway-Administration fails to fulfil those conditions, the sanction shall be deemed to be void and the railway shall not be worked or used until the conditions are fulfilled to the satisfaction of the Governor-General in Council.

Old Acts.

Act IV of 1879 ... S. 5 B. (1) (4) and (5) corresponding to sub-Ss (1), (4) and (5) of the present Act.

Act XVIII of 1854 ... No corresponding provision
Sub-Ss. (2) and (3) are new

(Notes).

Analogous provision.

(a) SUB. S (1) (c).

Cf.—S. 16, The Railway Regulation Act, 1842 (5 & 6, Vic c. 55)

Y

(b) SUB. S. (2).

Cf.—S. 6 the Railway Regulation Act, 1842 (5 & 6 Vic c. 55)

Z

I.—“Sub. S. (2) ”

Inspectors' report.

(a) The report of the Inspector that the opening of a railway would be attended with danger to the public by reason of the incompleteness of the works, (stating at the same time the reasons for his opinion), satisfies the requirement of the section *See Attorney-General v. G. W. Ry. Co*, L R 4 Ch D. 735.

A

(b) Where the opening of a railway has been prohibited by the Board of Trade, the Court will, at the instance of the Attorney-General, restrain that act, without examining the grounds on which it was declared illegal. *Attorney-General v. Orford, Worcester and Wolverhampton Ry. Co.*, 2 W. R. 330

B

20. (1) The provisions of sections 17, 18 and 19 with respect to the opening of a railway shall extend to the opening of the works mentioned in sub-section (2) when those works form part of, or are directly connected with, a railway used for the public carriage of passengers and have been constructed after the inspection which preceded the first opening of the railway.

Application of the provisions of the three last foregoing sections to material alterations of railway.

(2) The works referred to in sub-section (1) are additional lines of railway, deviation lines, stations, junctions and crossings on the level, and any alteration or re-construction materially affecting the structural character of any work to which the provisions of Sections 17, 18, and 19 apply or are extended by this section.

Old Acts.

Act IV of 1879)
,, XVIII of 1854) No corresponding provision.

(Note).

Analogous provision.

Cf.—S. 5, The Regulation of Railways Act, 1871 (34 & 35 Vic. c. 78).

C

21. When an accident has occurred resulting in a temporary suspension of traffic, and either the original-line and works have been rapidly restored to their original standard, or a temporary diversion has been laid for the purpose of restoring communication, the original line and works so restored, or the temporary diversion, as the case may be, may, in the absence of the Inspector, be opened for the public carriage of passengers, subject to the following conditions, namely:—

- (a) that the railway servant in charge of the works undertaken by reason of the accident has certified in writing that the opening of the restored line and works, or of the temporary diversion, will not in his opinion be attended with danger to the public using the line and works or the diversion; and
- (b) that notice by telegraph of the opening of the line and works or the diversion shall be sent, as soon as may be, to the Inspector appointed for the railway.

Old Act.

This section is new

(Note).

Scope of Ss. 21 and 22.

Provision has been made in Ss. 21 and 22 for the opening of a railway without the sanction of the Governor-General in Council or an Inspector, where there has been an accident resulting in a temporary suspension of traffic, or where works are of so unimportant a character that the application to them of the general law relating to the opening of railways is unnecessary. (See *Statement of Objects and Reasons*). **D**

Power to make rules with respect to the opening of railways.

22. The Governor-General in Council may make rules¹ defining the cases in which, and in those cases the extent to which, the procedure prescribed in sections 17 to 20 (both inclusive) may be dispensed with.

Old Act.

This section is new.

(Notes).

General.

(1) Section, how introduced.

Suggested at Railway Conference, 1888. **E**

(2) Scope of Ss. 21 and 22.

See under S. 21, *supra*. **F**

1.—“Rules.”

For rules, see Gazette of India 1891, Pt., I, p. 150. **G**

Power to close an opened railway¹.

23. (1) When, after inspecting any open railway used for the public carriage of passengers, or any rolling-stock used thereon, an Inspector is of opinion that the use of the railway or of any specified rolling-stock will be attended with danger to the public using it, he shall state the opinion, together with the grounds therefor, to the Governor-General in Council; and the Governor-General in Council may thereupon order that the railway be closed for the public carriage of passengers, or that the use of the rolling-stock so specified be discontinued, or that the railway or the rolling-stock so specified be used for the public carriage of passengers on such conditions only as the Governor-General in Council may consider necessary for the safety of the public.

(2) An order under sub-section¹ must set forth the grounds on which it is founded.

Old Acts.

Act IV of 1879	..	S. 5 E corresponds to Sub-S. 1 of the present Act.
Act XVIII of 1854	...	No corresponding provision.
		Sub-S. (2) is new.

(Notes).

Analogous provision.

Cf.—S 6, the Railway Regulation Act, 1842 (5 and 6 Vic c. 55) with Sub-S. 2 of this section. **H**

I.—“Power to close an opened railway.”

Decision of the Governor-General in Council.

Semble.—The—, is final, though come to, on an Inspector's report, which, on the face of it, might show that he, the Inspector, had come to a wrong conclusion. *Attorney-General v. G.W.Ry. Co.*, L R. 4 Ch. D. 735. **I**

24. (1) When a railway has been closed under the last foregoing section, it shall not be re-opened for the public carriage of passengers until it has been inspected, and its re-opening sanctioned, in accordance with the provisions of this Act.

Re-opening of a closed railway.

(2) When the Governor-General in Council has ordered under the last foregoing section that the use of any specified rolling-stock be discontinued, that rolling-stock shall not be used until an Inspector has reported that it is fit for use and the Governor-General in Council has sanctioned its use.

(3) When the Governor-General in Council has imposed under the last foregoing section any conditions with respect to the use of any railway or rolling-stock, those conditions shall be observed until they are withdrawn by the Governor-General in Council.

Old Acts.

Act IV of 1879 ...Cf.—S. 5 F (1) and (2) with sub-S. (1) and (2) of the present Act.

Act XVIII of 1854 ...No corresponding provision

Sub-S. (3) is new.

25. (1) The Governor-General in Council may, by general or special order, authorise the discharge of any of his functions under this chapter by an Inspector, and may cancel any sanction or order given by an Inspector discharging any such function or attach thereto any condition which the Governor-General in Council might have imposed if the sanction or order had been given by himself.

Delegation of powers under this chapter to Inspectors.

(2) A condition imposed under sub-section (1) shall for all the purposes of this Act have the same effect as if it were attached to a sanction or order given by the Governor-General in Council.

Old Acts.

Act IV of 1879 ... S 5-B (2) corresponds to Sub-S. (1) of the present Act.

Act XVIII of 1854 ... No corresponding provision.

Sub-S (2) is new

CHAPTER V¹

RAILWAY COMMISSIONS AND TRAFFIC FACILITIES.

(Notes).

1.—“Chapter V.”

Scope and nature of this chapter.

(a) This chapter is the most important part of the Act, and in its preparation, careful regard has been had to the Railway and Canal Traffic Act, 1888, and to the Annual Reports of the Railway Commissioners. (See *Statement of Objects and Reasons*). J

(b) Closely following the law in England, the Chapter imposes on railway administrations, the general duty of arranging to receive, forward and deliver traffic without unreasonable delay and without partiality or undue preference, and the special duty of so treating through traffic at through rates. (*Ibid*) K

1.—“Chapter V.”—(Concluded).

- (c) If the Governor-General in Council is satisfied that any person has just ground of complaint against a railway administration for breach of either duties, he may refer the case to a Railway Commission for decision. (*Ibid.*) **L**
- (d) Such a commission is to be appointed only where there are cases to be referred to it, and it will be deemed to be dissolved as soon as it has decided those cases. (*Ibid.*) **M**
- (e) It is to consist of a Law Commissioner who is to be a Judge of the High Court, having jurisdiction in reference to European British subjects under the Crim. Pro Code, in the place where the Governor-General in Council has ordered the Commission to sit, and of two Lay Commissioners, of whom one must be an expert in railway business and one may be a representative of the mercantile community or any other person whom the Governor-General in Council sees fit to appoint (*Ibid.*) (For further particulars, see, also, S. 26 of the Act). **N**
- (f) The commission so constituted may in any case referred to it, make any order by way of injunction, which may, in the circumstances, appear to the Commissioners to be suitable. (*Ibid.*) **O**
- (g) If two of the Commissioners concur on a question of fact, their decision on that question is to be conclusive. (*Ibid.*) **P**
- (h) From other decisions of the Commissioners an appeal will lie to a bench of not less than three Judges of the High Court of which the Law Commissioner is a member. (*Ibid.*) (For further particulars, see S. 31 of the Act) **Q**
- (i) Orders made by a Railway commission are to be enforced by the High Court of which the Law Commissioner was a member, as if they were orders by the High Court in the exercise of its original Civil jurisdiction. (*Ibid.*) **R**

Railway Commissions.

26. (1) For the purposes of this Chapter the Governor-General in Council shall, as occasion may in his opinion require, appoint a commission, styled a Railway Commission (in this Act referred to as the Commissioners) and consisting of one Law Commissioner and two Lay Commissioners.

(2) The Commissioners shall sit at such times and in such places as the Governor-General in Council appoints ¹.

(3) The Law Commissioner shall be such Judge of the High Court having jurisdiction in reference to European British subjects ² under the Code of Criminal Procedure, 1882, in the place where

the Commissioners are to sit as, in the case of a High Court established under the Statute 24 and 25 Victoria, Chapter 104, the Chief Justice or, in the case of the Chief Court of the Punjab, the Senior Judge or, in the case of the Court of the Recorder of Rangoon the Chief Commissioner of Burma may, on the request of the Governor-General in Council, assign by writing under his hand.

(4) The Lay Commissioners shall be appointed by the Governor-General in Council, and one at least of them shall be of experience in railway business.

Old Acts.

Act IV of 1879)	No corresponding provision
Act XVIII of 1854		

(Notes)

Analogous provision

Cf.—The Railway and Canal Traffic Act, 1854 (17 and 18 Vic. C. 31);

The Regulation of Railways Act, 1873 (36 and 37 Vic. c. 48)

The Railway and Canal Traffic Act, 1888 (51 and 52 Vict. c. 48)

S

1.—“Commissioners ...appoints”

Vacancy in the body of Commissioners.

(a) ENGLISH LAW

According to the——, the Commissioners are empowered to act, notwithstanding a vacancy in their body [See 51 and 52 Vict. c. 25, Ss. 2 & 5 (3)].

T

(b) INDIAN LAW.

The Railway Commissioners cannot act if there is a vacancy in their body. U

2.—“European British subjects.”

Jurisdiction over European British subjects.—Cr.P.C.

Under the Crim.Pro Code, all Judges of the various High Courts—Calcutta, Madras, Bombay, Allahabad——, also of the Chief Courts of the Punjab and Lower Burmah have jurisdiction over European British subjects [See Crim.Pro Code, S 4 (i) & (j)].

Y

Restriction of jurisdiction of Railway Commission to cases specially referred.

27. The Commissioners shall take cognizance of such cases only as are referred to them by the Governor-General in Council.

Old Act.

This section is new.

Reference of cases to Railway Commission.

28. In any of the following circumstances, namely:—

- (1) where complaint is made to the Governor-General in Council of anything done or any omission made by a railway-administration in violation or contravention of any provision of this Chapter ;
- (2) where any difference which is under the provisions of any agreement required or authorized to be referred to arbitration arises between railway-administrations, and the railway-administrations apply to the Governor-General in Council to have it referred to the Commissioners ;
- (3) where any other difference, being a difference between railway-administrations or one to which a railway-administration is a party, arises, and the parties there-to apply to the Governor-General in Council to have it referred to the Commissioners ;

the Governor-General in Council may ⁴, if he thinks fit, refer the case to the Commissioners for decision.

Old Acts.

Act IV of 1879)	No corresponding provision.
Act XVIII of 1854.)	

(Notes).

General.

Analogous provision.

Of.—Ss 6, 8 and 9, the Regulation of Railways Act, 1873 (36 and 37 Vict. c. 48). **W**

1.—“ Clause (a) ”

Cases which may be referred to the Railway Commission.

- (a) Failure on the part of any railway administration to afford all reasonable facilities for the receiving, forwarding and delivering of traffic upon and from the several railways belonging to, or worked, by it, and the return of rolling-stock. (*Vide* S. 42 (1), *infra*). **X**
- (b) The making or giving any undue or unreasonable preference or advantage to, or in favour of any particular person or railway administration, or any particular description of traffic, in any respect whatsoever, or the subjecting of any particular person or railway administration or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever. (*Vide* S. 42 (2), *infra*). **Y**
- (c) Omission on the part of a railway administration having or working railways which form a continuous line of communication, or having its terminus or station within one mile of the terminus or station of another railway administration, to afford all due and reasonable facilities for receiving, and forwarding, by one of such railways all the traffic arriving by the other at such terminus station, without any unreasonable delay, and without any undue or unreasonable preference or advantage or prejudice or disadvantage, so that no obstruction be offered to the public desirous of using the railways as a continuous line of communication. (*Vide* S. 42 (3), *infra*). **Z**

1.—“ Clause (a) ”—(Concluded).

- (d) Objection by any such railway administration to a proposed rate, apportionment or route for receiving, forwarding and delivering through traffic at through rates. (*Vide* S. 42 (4) (d), *infra*). **A**
- (e) Questions which may arise under S. 41, *infra*, in reference to the ferry, ship, boat or raft, so far as it is used for the purposes of the traffic of the railway. (*Vide* S. 44, *infra*). **B**
- (f) Any question or dispute which may arise with respect to the terminals charged by a railway administration, in respect of which the Commissioners may decide what is a reasonable sum to be charged. (*Vide* S. 46 (1), *infra*). **C**

2.—“ Clauses (b) and (c) ”

Scope of Clauses (b) and (c).

Clauses (b) and (c) of the section provide for the reference to the Railway Commissions of other differences than such as relate to traffic facilities. (See *Statement of Objects and Reasons*) **D**

3 —“ Clause (c).”

Rates—Disputes—Reference.

- (a) According S. 9 of the Regulation of Railways Act, 1873 (*Cf* Cl. (c) present section), dispute relating of railways for poor rates, may be referred to the Commissioners. *L. and N.W. Ry. Co v. Wigan Union*, 2 Ry. and Ca. Tr. Cas. 240. **E**
- (b) So, also, disputes as to the rating of docks. *M.S. and L. Ry. Co v. Canton Union*, 2 Ry. and Ca. Tr. Cas. 53. **F**

4. —“ May.”

Referring cases simply optional

It is simply optional to refer cases to the Commissioners. See *Daries v. Elans*, L.R. 9 Q.B.D. 238 (243). **G**

Constitution of
Railway Commission in session

29. The three Commissioners shall attend at the hearing of any case referred to them for decision under this Chapter and the Law Commissioner shall preside at the hearing.

Old Acts.

Act IV of 1879) No corresponding provision
Act XVIII of 1854	

(Note).

Analogous provision

Cf.—S. 5 (3), the Railway and Canal Traffic Act, 1888 (51 and 52 Vict. c. 25) **H**

Powers of Railway
Commission.

30. (1) In hearing any such case the Commissioners shall have the powers which may be exercised in the hearing of an original civil suit by a High Court.

(2) The decision shall, if the Commissioners differ in opinion, be in accordance with the opinion of the majority and the final order in the case shall be by way of injunction¹ and not otherwise.

(3) At the hearing, the Commissioners may permit any party to appear before them either by himself or by any legal practitioner entitled to practise in any High Court.

Old Acts.

Sub-section 1 is new.

Act IV of 1879.)
Act XVIII of 1854.) No Corresponding provision as to sub-sections (2 and 3)].

(Notes).

General.

(1) Analogous provision.

Cf—Sub-S. (2), with S. 5 (3), the Railway and Canal Traffic Act, 1888 (51 and 52, Vic., c 25) I

Cf—Sub-S. (3) with S. 50. (*Ibid*). J

(2) Origin of section.

As to the—, see Twelfth Report, Railway Commissioners, p 6, and 11 App. Cas. 97. K

1.—“*Shall be by way of injunction.*”

(1) Temporary injunction.

See O XXXIX, rr. 1—4 and S. 95, Act V of 1908 (Code of Civil Procedure) L

(2) Perpetual injunctions.

See Ss. 54—57, Specific Relief Act (I of 1877). M

(3) Mandatory injunction.

See S 55, Specific Relief Act (I of 1877). N

(4) Agreement to work line of another under certain terms.

A Railway Company which had agreed to work the line of another railway, and during the continuance of the agreement to develop and accommodate the local and through traffic thereon, and to carry over it certain traffic particularly specified, was restrained by injunction from carrying over other lines belonging to them traffic which ought to have passed over the plaintiff's line. *Wolverhampton and Walsall Ry Co. v. London and N.W. Ry. Co*, L.R. 16 Eq. 127. O

(5) Contract cannot be specifically enforced.

Where a —, owing to this inability, *e g*, to superintend the working of the signals and points of a railway, an injunction cannot be granted. *Powell Duffryn Steam Coal Co. v. Taff Vale Ry Co.*, L R. 9 Ch. Ap. 331. P

Appeals from orders of Railway Commission².

31. (1) An appeal shall not lie from any order of the Commissioners upon any question of fact¹ on which two of the Commissioners are agreed.

(2) Subject to the provisions of sub-section (1), an appeal shall lie from an order of the Commissioners—

(a) Where the Law Commissioner was the Recorder or Additional Recorder of Rangoon, to the High Court of Judicature at Fort William in Bengal, and

(b) in any other case, the High Court of which the Law Commissioner was a member.

(3) Such an appeal must be presented within six months from the date of the order appealed from, and shall be heard by a bench of as many Judges, not being fewer than three, as the High Court may by rule prescribe.

(4) In the hearing of the appeal the High Court shall, subject to the other provisions of this Chapter, have all the powers which it has as an Appellate Court under the Code of Civil Procedure (XIV of 1882), and may make any order which the Commissioners could have made.

etc.

Act IV of 1879.)
Act XVIII of 1854.) No corresponding provision.

(Notes).

General.

Analogous Provision.

Cf.—S. 26, the Regulation of Railways Act, 1873 (36 and 37 Vic., c. 48).

S. 17, the Railway and Canal and Traffic Act, 1888 (51 and 52 Vic., c. 25). Q

I.—“Question of fact.”

Question of fact—Examples.

(a) Reasonableness is a question of fact and not of law. *Watkinson v. Wrexham Mold, etc., Ry. Co.*, (No.1) 3 Ry. and Ca. Tr. Cas. 5. R

(b) So, also, the question whether or not an undue prejudice has been caused. *Palmer v. L and S. W. Ry Co.*, L R T. C. P. 58; Ry. and Ca. Tr. Cas. 248. S

(c) So, also, that which determines undue preference, *Diphways Casson State Co. v. Festiniog Ry. Co.*, 2 Ry. and Ca. Tr. Cas. 73 (81). T

(d) So, also, the question whether a Railway Company is bound to run over a foreign railway, and collect traffic without receiving any further remuneration than the mileage rate chargeable on its railway. *Watkinson v. Wrexham Mold, etc., Ry. Co.* (1) 3 Ry. and Ca. Tr. Cas. 5. U

2.—“Appeals...Commission.”

(1) Question of fact—Appeal.

- (a) Where it was stated that a Railway Commission had erred in law, and that it had permitted through rate on the plea that it was enough for the applicant company to prove that the proposed route was in itself a reasonable one, without other evidence being given that the existence of another route would be advantageous to the public, appeal was refused on the ground that the question was one of fact. *G. W. Ry. Co. v. Seven and Wye, etc., Ry. Co.*, 5 Ry. and Ca. Tr. Cas. 170 (199). **Y**
- (b) Likewise, on a Railway Commission granting a through rate, an application for a case for the opinion of a superior Court was refused. *Central Wales, etc., Ry. Co., v. G. W. Ry. Co.*, 2 Ry. and Ca. Tr. Cas. 191 (197). **W**
- (c) (i) Where an application for a case, on the question as to whether a railway company performed a “terminal service” in using or giving the use of sidings for shunting handling goods and other like services, was made, held that the application should be refused. *Chatterley Iron Co. v. North Staff and Ry. Co.*, 3 Ry. and Ca. Tr. Cas. 238. **X**
- (ii) But in *Hall v. L. B. and S. C. Ry. Co.* 4 Ry. and Ca. Tr. Cas. 398 (420), a case was granted on a question of terminals. **Y**

(2) Question of law—Appeal.

- (a) An order of the Railway Commissioners is appealable, and it is seen from their judgment, though not in the order itself, that in arriving at the result mentioned in the order they had primarily decided on a question of law. *N.E. Ry. Co. v. N. B. Ry. Co.*, 10 Ry. and Ca. Tr. Cas. 82. **Z**
- (b) So, also, on the Railway Commissioner's making an order for facilities for passenger traffic, a case was granted, on the question as to whether such an order complied with the requirements of some of the provisions specified in the applicant's and defendant's special Acts, since it did not order the facilities whereto the applicant company would be entitled. *Great North of Scotland Co. v. Highland Ry. Co.*, 3 Ry. and Ca. Tr. Cas. 103 (117). **A**
- (c) Likewise, a case will be granted on the question whether or not a company was bound under the provision of its special Act to supply waggons to traders traffic. *Watkinson v. Wrexham Mold, etc. Ry. Co.* (No. 1) 3 Ry. and Ca. Tr. Cas. 5. **B**
- (d) So, also, a case will be granted on the question, whether a Railway Company carrying and conveying traffic could, by a notice, relieve itself from the duty of carrying certain class of traffic except under special terms and special rates. *Aberdeen Commercial Co. v. Gr. North. of Sc. Ry. Co.* **C**

(3) Appeal—Procedure.

See O. XLI (Act V of 1908).

D

32. Notwithstanding any appeal to the High Court from an

Operation of orders
of Railway Commis-
sion.

order of the Commissioners, the order shall, unless the Commissioners or the majority of them see fit to suspend it, continue in operation until it is reversed or varied by that Court.

Old Acts.

Act IV of 1879.

Act XVIII of 1854

No corresponding provision.

(Note).**Analogous provision***Cf.*—S. 26, the Regulation of Railway Act, 1873 (36 and 37 Vic., c. 48).**33.** (1) The Commissioners, in the exercise of their jurisdictionAssessors¹.

under this Chapter, may, from time to time, with the general or special sanction of the Governor-General in Council, call in one or more persons of engineering or other technical knowledge to act as assessors.

(2) There shall be paid to such persons such remuneration as the Governor-General in Council upon the recommendation of the Commissioners may direct.

Old Act.

This section is new.

(Notes).**Analogous provision***Cf.*—S. 140, Act V of 1908 (The Code of Civil Procedure).**1.—“Assessors.”****Assessors: meaning of the term**

(a) Literally, those who sit by the side of another.

F1

(b) The term is also frequently applied to persons associated with a Judge or Judges to advise them and to assist in their deliberations, but who take no part in giving the judgment

F2.

(c) Until the contrary is shown, it must be presumed that persons who under the law are called upon to act as assessors will do their duty

A. W. G

34 The Governor-General in Council may make rules¹ regulating proceedings before the Commissioners and enabling the Commissioners to carry into effect the provisions of this Chapter and prescribing fees to be taken in relation to proceedings before the Commissioners.

Power of the Governor-General in Council to make rules for the purposes of this chapter.

Old Acts.Act IV of 1879.
Act XVIII of 1854.

No corresponding provision.

(Note).**Analogous provision.***Cf.*—S. 20 (1), the Railway and Canal Traffic Act, 1888 (51 and 52 Vic., c. 25).

I —“ Rules.”

(1) Rules made under the section.

For—, see Government of India Notification, No. 373, dated 25th Oct. 1892. I

(2) Provision with respect to publication of rules.

For—, see S. 143, *infra*. J

35. The costs ¹, of and incidental to any proceedings before the Commissioners or the High Court under this Chapter shall be in the discretion of the Commissioners or the High Court, as the case may be, and the payment of costs awarded by the Commissioners may be enforced by the Court, of which the Law Commissioner was a Judge, as if the payment had been ordered by a decree of a High Court.

Costs of proceedings under this chapter.

Old Acts

Act IV of 1879.) No corresponding provision.
Act XVIII of 1854	

(Notes)

Analogous provision.

Cf.—S. 28, the Regulation of Railways Act, 1873 (36 and 37 Vic., c. 48) and S. 19, the Railway and Canal Traffic Act, 1888 (51 and 52 Vic., c. 25). K

I.—“ Costs.”

(1) Application for costs essential.

An application for costs is to be made, for enabling a party to get his costs. *Maniot v. L. and S. W. Ry. Co.*, 1 Ry. and Ca. Tr. Cas. 47. L

(2) Costs not asked for—Effect.

Costs were refused on a rule being moved, costs not being asked for in the same. (*Ibid.*) M

(3) Defendant's cost—Complaint made—Applicant asking for costs, unsuccessful.

Where a person, who makes a complaint and asks for costs, is unsuccessful, costs will be granted to defendants. *Oulade v. N. E. Ry. Co.* (No. 3), 3 Ry. and Ca. Tr. Cas. 35. N

(4) Defendant's costs—Costs, not applied for, in first instance.

It is doubtful whether the defendants would have no right at all for costs, when the same had not been applied for in the first instance. (*Ibid.*) O

(5) Case first of its kind—Costs.

(a) Where a case is the first of its kind, costs will be refused, though the applicant succeeds in his case. *Woodger v. G. E. Ry. Co.*, 2 Ry. and Ca. Tr. Cas. 35. P

(b) Likewise in a through-rate case, the defendants being entitled to the judgment of the Commissioner prior to a through rate being put in force. *Central Wales Ry. Co.*, L. R. 10 Q. B. D. 231. Q

I.—“Costs”—(Continued).

(6) Two Companies.

(a) THROUGH TRAFFIC CASE—ONE OF TWO COMPANIES, OBSTRUCTION BY—COSTS.

In a through traffic case against two companies, one of them placed obstruction in the way of through route. Held, that the obstructing company must pay the cost of the applicant, the other company paying its own costs. *Victoria Coal and Iron Co. v. Neath and Brecon and Mid. Ry. Cos.*, 3 Ry. and Ca. Tr. Cas. 37. R

(b) SUCCESSFUL APPLICANT.

A person succeeding in an action against two companies, was ordered to be paid his costs by both of them, in equal shares. *Toomer v. L.R. and D. and S. Ry. Cos.*, 3 Ry. and Ca. Tr. Cas. 79. S

(7) Costs allowed.

Costs will generally be allowed, on a company acting in such a manner as to render it proper and necessary for the making of an application to the Court for redress. *Bazendal v. L. and S.W. Ry. Co.*, 1 Ry. and Ca. Tr. Cas. 231. T

(8) Cost disallowed.

EXAMPLES.

(a) Costs were disallowed, when there is success for each party on a material part of the case. *Richardson v. Mid. Ry. Co.*, 4 Ry. and Ca. Tr. Cas. 1 (10). U

(b) So, also, where the claim by the applicants is very much in excess of that to which they were found to have had a right and the offer made by the defendants was by far less than that for which they were found liable. *Highland Ry. Co. v. Gl. North of Sc. Ry. Co.*, Ry. and Ca. Tr. Cas. 90 (98). V

(c) So, also, in a question of terminal charges a sum was allowed in excess of the applicant's offer, but far below the contention of the defendant Company. *Roron v. N.E. Ry. Co.* (No. 2), 4 Ry. and Ca. Tr. Cas. 284. W

(d) So, also, when neither the appellants nor the respondents in an appeal succeeded entirely in their case. *Denaby Main Colliery Co. v. M.S. and L. Ry. Co.*, 6 Ry. and Ca. Tr. Cas. 133. X

(9) Application may be dismissed without costs.

—, if the Commissioners are of opinion that, on the merits, the applicant is within his right in bringing the complaint. *Skinnergrove Iron Co. v. N.E. Ry. Co.*, 5 Ry. and Ca. Tr. Cas. 244. Y

(10) Undue preference—Injunction without costs

In a case of undue preference brought against a Railway Company, an injunction was granted without costs, the Railway Company being found to have acted *bona fide* and without any intention of prejudicing the complainants as rivals in trade with each other. *Thompson v. L. and N.*

W. Ry. Co., 2 Ry. and Ca. Tr. Cas. 115. Z

(11) Through route case—Partial success—Costs.

In a—Railway Company succeeding only partially was only allowed one moiety of its costs. *Greenock v. Wemyss Bay Ry. Co. v. Gal. Ry. Co.* (No. 2), 2 Ry. and Ca. Tr. Cas. 136. A

1.—“Costs” —(Concluded).

{12} Apportionment—Partial taxation.

In order to avoid the inconvenience of a partial taxation, apportionment is permissible, *e. g.*, when the complainants were only successful in one half of the case. *Hastings Town Council v. S. & Ry. Co.*, 3 Ry. and Ca. Tr. Cas. 179. **B**

{13} Chief ground of complaint is not made out.

Each party will be ordered to pay its own costs, if the—. *Locke v. N. E. Ry. Co.*, 3 Ry. and Ca. Tr. Cas. 44 (47). **C**

{14} Appeal—Costs

In appeal, the successful party is entitled to costs. *Manson House Assoc., etc. v. G. W. Ry. Co.*, 9 Ry. and Ca. Tr. Cas. 58. **D**

36. (1) The Court of which the Law Commissioner was a

Execution of order
of Railway Commis-
sion and High
Court.

Judge may, if it appears on the application of any person who was a party to the proceedings before the Commissioners or on appeal before the High

Court, or of the representative of any such person, that an injunction made under this Chapter by the Commissioners or by a High Court has not been obeyed by the party enjoined, order such party to pay a sum not exceeding one thousand rupees for every day during which the injunction is disobeyed after the date of the order directing such payment.

(2) The payment of such sum may be enforced by the Court which made the order as if that Court had given a decree¹ for the same, and the Court may direct that the whole or any part of the sum shall be paid to the person making the application under sub-section (1) or to the Government.

Old Acts.

Act IV of 1879.)	No corresponding provision.
Act XVIII of 1854.)	

(Notes).

Analogous provision.

Cf.—S. 8, The Railway and Canal Traffic Act, 1854 (17 and 18 Vic., c. 31). **E**

1.—“Decree”

Execution of decrees.

As to—, generally, see O. XXI, Act V of 1908, Code of Civil Procedure. **F**

Evidence of docu-
ments.

37. A document purporting to be signed by the Commissioners, or any of them, shall be received in evidence without proof of the signature, and shall, until the contrary is proved, be deemed to have been so signed and to have been duly executed or issued by the commissioners.

Old Acts.

Act IV of 1879.	}	No corresponding provision.
Act XVIII of 1854.		

(Notes).**Analogous provision.***Cf*—S 30 of the Regulation of Railways Act, 1873 (36 and 37 Vic., c. 48). **G****38.** The Commissioners shall, as soon as may be after the

Submission to the
Governor-General in
Council of special
reports by Railway
Commission

disposal of each case referred to them, submit to
the Governor-General in Council a special report
on the case, and the Governor-General in Council
shall cause the report to be published in such

manner as he thinks fit for the information of persons interested
in the subject-matter thereof.

Old Act.

This section is new

39. Except for the purpose of the last foregoing section, a

Dissolution of Rail-
way Commission

Railway Commission shall be deemed to be dis-
solved at the close of the last of the sittings of the
Commissioners for the decision of the cases refer-

ed to them :

Provided that, on the application of any person who was a party
to the proceedings before the Commissioners, or of the represen-
tative of any such person, the Governor-General in Council may, if
he thinks fit, in any case in which the order passed by the Commis-
sioners is not open to appeal, re-appoint the Commissioners for the
purpose of hearing an application for a review of their decision and
of granting the same and rehearing the case if they think that the
case should be re-heard.

Old Act.

This section is new

Finality of orders
of Railway Commis-
sion subject to the
foregoing provisions
of this Chapter

40. Subject to the foregoing provisions of this
Chapter and to any direction of Her Majesty in
Council, an order of the Commissioners shall be
final and shall not be questioned in or restrained
by any Court.

Old Acts.

Act IV of 1879.	}	No corresponding provision.
Act XVIII of 1854.		

(Notes).**Analogous provision.***Cf.*—S. 17 (6), the Railway and Canal Traffic Act (51 and 52 Vict. c. 25). **H**

41. Except as provided in this Act, no suit shall be instituted or proceeding taken for anything done or any omission made by a railway administration in violation or contravention of any provision of this Chapter or of any order made thereunder by the Commissioners or by a High Court.

Bar of jurisdiction of ordinary Courts in certain matters cognizable by Railway Commission¹

Old Acts.

Act IV of 1879)
Act XVIII of 1854.) No corresponding provision

(Notes)

Analogous provision

(f) —S 6, the Railway and Canal Traffic Act, 1854 (17 and 18 Vic c 31). **L**

I —“Bar of jurisdiction. . .commission”

(1) Suit to recover sums paid for terminals

The High Court will not allow a suit for the recovery of sums paid on account of terminals, to be filed. 15 B 537 **J**

(2) Overcharges made by reason of undue preference—Damages

(a) ENGLISH LAW ALLOWING DAMAGES

As regards overcharges made by reason of an undue preference no action will lie, nor can any counter claim be sustained, but yet, the Commissioners can now award damages under S 12 of the Railway and Canal Traffic Act (51 and 52 Vic c 25) See *Phipp's v Land N W Ry. Co.* 8 Ry. and Ca Tr Cas. 83 **K**

(b) INDIAN LAW, contra

(i) Provisions similar to S. 12 of the Railway and Canal Traffic Act, 1888, have not been inserted in the Present Act

(ii) According to S 30 (2), *supra*, the final order in a case must be by way of injunction and not otherwise

(iii) So, according to the Indian Law, when overcharges have been made to pay by reason of undue preference, no damage can be allowed. **L**

Traffic facilities.

42. (1) Every railway administration shall, according to its powers, afford all reasonable facilities for the receiving, forwarding and delivering of traffic¹ upon and from the several railways belonging to or worked by it and for the return of rolling-stock.

Duty of railway administrations to arrange for receiving and forwarding traffic without unreasonable delay and without partiality.

(2) A railway administration shall not make or give any undue or unreasonable preference or advantage to or in favour of any particular person or railway administration, or any particular description of traffic, in any respect

whatsoever, or subject any particular person or railway administration or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever ².

(3)³ A railway administration having or working railways which form part of a continuous line of railway communication, or having its terminus or station within one mile of the terminus or station of another railway administration, shall afford all due and reasonable facilities for receiving and forwarding by one of such railways all the traffic arriving by the other at such terminus or station, without any reasonable delay, and without any such preference or advantage or prejudice or disadvantage as aforesaid, and so that no obstruction may be offered to the public desirous of using such railways as a continuous line of communication, and so that all reasonable accommodation may by means of such railways be at all times afforded to the public in that behalf

(4) The facilities to be afforded under this section shall include the due and reasonable receiving, forwarding and delivering by every railway administration, at the request of any other railway administration, of through traffic to and from the railway of any other railway administration at through rates.

Provided as follows:—

(a) the railway administration requiring the traffic to be forwarded shall give written notice of the proposed through rate to each forwarding railway administration, stating both its amount and its apportionment and the route by which the traffic is proposed to be forwarded. The proposed through rate for animals or goods may be per truck or per maund ;

(b) each forwarding railway administration shall, within the prescribed period after the receipt of such notice, by written notice inform the railway administration requiring the traffic to be forwarded whether it agrees to the rate, apportionment and route, and, if it has any objection, what the grounds of the objection are ;

(c) if at the expiration of the prescribed period no such objection has been sent by any forwarding railway administration, the rate shall come into operation at the expiration of that period ;

- (d) if an objection to the rate, apportionment or route has been sent within the prescribed period, the Governor-General in Council may, if he thinks fit, on the request of any of the railway administrations, refer the case to the Commissioners for their decision ;
- (e) if the objection is to the granting of the rate or to the route, the Commissioners shall consider whether the granting of the rate is a due and reasonable facility in the interests of the public, and whether, regard being had to the circumstances, the route proposed is a reasonable route, and shall allow or refuse the rate accordingly or fix such other rate as may seem to the Commissioners to be just and reasonable ;
- (f) if the objection is only to the apportionment of the rate, and the case has been referred to the Commissioners, the rate shall come into operation at the expiration of the prescribed period, but the decision of the Commissioners as to its apportionment shall be retrospective : in the case of any other objection the operation of the rate shall be suspended until the Commissioners make their order in the case ;
- (g) the Commissioners, in apportioning the through rate, shall take into consideration all the circumstances of the case including any special expense incurred in respect of the construction, maintenance, or working of the route or any part of the route, as well as any special charges which any railway administration is entitled to make in respect thereof ;
- (h) the Commissioners shall not in any case compel any railway administration to accept lower mileage rates than the mileage rates which the administration may for the time being, legally be charging for like traffic carried by a like mode of transit on any other line of communication between the same points, being the points of departure and arrival of the through route ;
- (i) subject to the foregoing provisions of this sub-section, the Commissioners shall have full power to decide that any proposed through rate is due and reasonable

notwithstanding that a less amount may be allotted to any forwarding railway administration out of the through rate than the maximum rate which the railway administration is entitled to charge, and to allow and apportion the through rate accordingly ;

- (j) the prescribed period mentioned in this sub-section shall be one month, or such longer period as the Governor-General in Council may, by general or special order, prescribe.

Old Acts.

Act IV of 1879.	}	No corresponding provision.
Act XVIII of 1854.		

(Notes).

General.

Analogous provision.

- (a) SUB-SS. (1), (2), (3)

Cf.—S. 2, the Railway and Canal Traffic Act, 17 and 18 Vic. c. 31. M

- (b) SUB-S (4) WITH THE EXCEPTION OF CL. (i)

Cf.—S. 11, the Regulation of Railways Act, 1873 (36 and 37 Vic. c. 48) and S. 25, the Railway and Canal Traffic Act, 1888 (51 and 52, Vict. c. 25) N

- (c) SUB-S (4), CL (i)

Cf.—S. 12, the Regulation of Railways Act, 1873 (36 and 37 Vic. c. 48) O

(2) Section, source of.

See, Eighth Report, Railway Commissioners, p. 4,

—, Tenth Report, Railway Commissioners, p. 6,

—, Thirteenth Report, Railway Commissioners, p. 4

(3) Contravention of provision of section—Remedy. P

No suit will lie against a railway administration for anything done, or any omission made, in violation or contravention of any provision of the section (See S. 41, *supra*) Q

(4) Enforcement of provisions of Sub-sections (1) (2) and (3) when justifiable.

(a) When a case of public inconvenience is made out. *Barrett v. G. N. and Md. Ry. Cos.*, 1 Ry. and Ca. Tr. Cas. 38. R

(b) Occasional delay and inconvenience to the public will not suffice. *Carrter v. I. B. and C. Ry. Co.*, 1 Ry. and Ca. Tr. Cas. 58. S

(c) Those who use the railway must put in a *bona fide* complaint on behalf of the public. (*Ibid*) T

1.—“Afford all reasonable facilities....of traffic.”

Question of price, no reference to.

The words “a railway administration.....shall afford all due and reasonable facilities for receiving and forwarding.....all traffic” seem to have no reference to the question of price. (*Ibid*). U

1.—“Afford all reasonable facilities....of traffic”—(Continued).

RAILWAY ADMINISTRATION IS BOUND TO AFFORD ALL REASONABLE FACILITIES FOR RECEIVING, FORWARDING AND DELIVERING TRAFFIC.

A.—ACCOMMODATION *RE* STATION AND SIDING.

(1) Covered station, public entitled to, where.

A covered station is held to be a reasonable accommodation to which the public at large will be entitled, provided every other junction on the line of a Railway Company had a covered station *Cateham Ry Co v L B. and S.C. Ry Co*, 1 Ry and Ca Tr Cas 32 (but see *S E Ry Co. v. Railway Commissioners*, 3 Ry and Ca Tr Cas 505. **Y**

(2) Necessity for covering footpath leading to station from carriage road

A station was situate 180 yards from any carriage road. No protection from the weather for passengers passing between the station and the road was afforded. Held that sufficient accommodation for the public was not afforded. *Innes v. L B and S C and L and S W Ry Cos*, 2 Ry. and Ca. Tr Cas 155. **W**

(3) Necessity for footpath between stations being covered.

When two stations are only $\frac{1}{2}$ a mile apart, facilities can be said to have been given for passenger traffic if a covered footpath between the two stations is made and if portage is provided for passengers with luggage *Sussex Co Council v. L B and S C and L and S W Ry Cos*, 8 Ry. and Ca. Tr. Cas 17. **X**

(4) Space and other arrangements—Duty of Railway Company.

A Company with sufficient powers must not keep its platforms, booking offices and other structures at any station in such a condition, as to space and other arrangements as to cause dangerous or obstructive confusion, delay or other impediment to the proper reception, transmission, or delivery of the ordinary traffic of that station, whether consisting of passengers or goods. *S E Ry Co v Railway Commissioners*, 3 Ry. and Ca Tr Cas 505 (508 **Y**

(5) New station, establishment of.

(a) “With respect to stations, there is no objection to establish them at any particular place or places unless the Company thinks fit to do so” *S E Ry. Co v. Ry Commissioners*, 3 Ry. and Ca Tr Cas 505 (507), per Selbourne, L. C. (but see *Harris v L. and S W.Ry. Co* 3 Ry. and Ca. Tr. Cas 331. **Z**

(b) “But, when the Company has, in fact, opened a station at a particular place, and invites the public to resort to it for the purposes of being received or delivered as passengers, or from trains announced as starting from or stopping at that station, or of having their goods received there for carriage or delivered there after carriage, it is bound to afford, at that station to the extent of its powers, all reasonable facilities for receiving, forwarding, and delivering such passengers and goods. (*Ibid*) **A**

1.—“Afford all reasonable facilities....of traffic”--(Continued).

RAILWAY ADMINISTRATION IS BOUND TO AFFORD ALL REASONABLE FACILITIES FOR RECEIVING, FORWARDING AND DELIVERING TRAFFIC--(Continued).

A.—ACCOMMODATION *RE* STATION AND SIDING--(Continued).

(6) Facilities, what are—Instances.

- (a) Increase of accommodation for the delivery of tickets. See *S. F. Ry. Co. v. Railway Commissioners*, 3 Ry. and Ca. Tr. Cas. 505. **B**
- (b) The providing of waiting room at a station. *S. F. Ry. Co. v. Railway Commissioners*, 3 Ry. and Ca. Tr. Cas. 464. **C**
- (c) Improving the accommodation for cattle. (*Ibid*) **D**
- (d) A cloak room for the receipt and forwarding of traffic. *Singer Manufacturing Co. v. L. and S. W. Ry. Co.* (1894) 1 Q. B. 833. **E**
- (e) Working of an existing siding. *Beeston Brewery Co. v. Mid. Ry. Co.* (No. 1), 5 Ry. and Ca. Tr. Cas. 53. **F**

N. B.—The Railway Commissioners have power to order the above.

(7) Facilities, what are not—Instances.

- (a) Reserving a portion of a station for a refreshment room, *S. F. Ry. Co. v. Railway Commissioners*, 3 Ry. and Ca. Tr. Cas. 505. **G**
- (b) Extending a platform accommodation according to a specified plan, (*Ibid*.) **H**
- (c) Covering platforms, a bridge and a portion of the carriage yard. (*Ibid*.)
- (d) Adding waiting rooms of a specified size (*Ibid*.) **I**
- (e) The constructing of a branch line *Beeston Brewery Co. v. Mid. Ry. Co.* (No. 1) 5 Ry. and Ca. Tr. Cas. 53 (39) **J**
- (f) Making a new siding, *Beeston Brewery Co. v. Mid. Ry. Co.* (No. 1) 5 Ry. and Ca. Tr. Cas. at p. 58. **K**
- (g) A Railway Company is held not to afford all reasonable facilities, if it makes illegal or excessive charges for the conveyance of goods traffic. *Chatterby Iron Co., v. North Staff Ry. Co.*; 3 Ry. and Ca. Tr. Cas. 238. **L**

N. B.—The Railway Commissioners are not empowered to order a Railway Company to attend to the above. **M**

(8) Structural alteration.

Facilities may be ordered which necessitate—; but the same cannot be ordered to be executed according to a specified plan. (*Ibid*.) **N**

(9) Passenger station—Facilities for goods.

Quere.—Whether the Commissioners have power under S. 2 of the Railway and Canal Traffic Act, 1854 (*Cf.* present section) to order a Railway Company to construct a goods siding or conveniences for goods traffic at a passenger station. See *Newry Nav. Co v. Gt. Northern Ry. Co.*
• (*Ir.*) 7 Ry. and Ca. Tr. 176. **O**

(10) Providing of water closets.

Quere.—Whether—for the use of passengers, is a reasonable facility. *West Ham. Corp. v. G. E. Ry. Co.* 9 Ry. and Ca. Tr. Cas. 7. **P**

1.—“Afford all reasonable facilities....of traffic”—(Continued).

RAILWAY ADMINISTRATION IS BOUND TO AFFORD ALL REASONABLE FACILITIES FOR RECEIVING, FORWARDING AND DELIVERING TRAFFIC—(Contd.).

A.—ACCOMMODATION RE STATION AND SIDING—(Concluded).

(11) Disconnecting siding constructed under an agreement.

(a) On a Railway Company disconnecting a siding constructed under the terms of an agreement which gave the Railway Company power to disconnect the same at any time, *held* that, where other persons had sidings, the refusal of the Railway Company to grant the same to the applicants would, if the circumstances were the same, constitute an undue and unreasonable prejudice *Beeston Brewery Co v. Mid. Ry. Co.* (No 1) 5 Ry and Ca Tr. Cas 58. Q

(b) Likewise, the depriving an individual of the continuance of a siding, while competitors in trade of the applicants were not so deprived, would constitute an undue prejudice (*Ibid*) R

(c) So, in *Portway v Colne Valley and Ry Co*, 7 Ry and Ca Tr. Cas. 102, *held*, that the Railway Company ought to reconnect at its own expense the applicant's siding with the main line S

(12) Siding accommodation—Connection severed—Working of siding on terms.

But, on a Railway Company disconnecting a siding under similar circumstances for compelling the payment by the applicants of “station rates” on payment of which the Company were willing to re-connect the siding, *held* the siding accommodation will be furnished on their entering into an agreement to pay the “station rates” without deduction. *Guarlot Elton & Co v Mid Ry Co*, (No. 2) 5 Ry. and Ca. Tr. Cas 60 T

B — ACCOMMODATION RE TRAIN

(1) Running of extra train.

(a) A line was worked under a working agreement. On a complaint of the working Company, the Commissioners ordered the working Company to run an additional third class passenger train daily each way, and further ordered that not less than two passenger trains should be run each way daily on the branch line of the owning Company, timed for convenient correspondence at the junction with the main line traffic. *Dublin and Meath Ry Co. v Mid. & Western of Ir. Ry. Co.*, 3 Ry. and Ca Tr. Cas 379. U

(b) On the amount of the traffic not being in proportion to the cost of carriage, the above order re the running of the third class passenger train was subsequently rescinded (*Ibid.*) (No. 2) 5 Ry. and Ca. Tr. Cas. 142. V

(2) Discontinuing the use of a passenger station.

It is not within the power of a Railway Commission to prevent a Railway Company from pulling down and ——. *Darlaston Local Board v. L. and N.W. Ry. Co*, 8 Ry. and Ca. Tr. Cas. 216. W

1.—“Afford all reasonable facilities....of traffic”—(Continued).

RAILWAY ADMINISTRATION IS BOUND TO AFFORD ALL REASONABLE FACILITIES FOR RECEIVING, FORWARDING AND DELIVERING TRAFFIC—(Contd.).

C.—TRAFFIC.

I—Rates and fares not authorised.

(1) Illegal or excessive charges.

(a) Where a Railway Company makes excessive or illegal charges, and such charges are intended or calculated to prevent, and do prevent the conveyance of traffic on the railway, they are illegal. *Young v. Gwendraeth Valleys Ry Co*, 4 Ry and Ca. Tr. Cas 217. **X**

(b) The Railway Company, by making such charges, subjects such traffic to an undue prejudice within S 2, the Railway and Canal Traffic Act, 1854 (Cf. present section). *Aberdeen Commercial Co v. Great North of Scotland Ry. Co*, 8 Ry. and Ca. Tr. Cas. 205. **Y**

(2) Question of excessive charges—Jurisdiction of Commissioners.

(a) “The question of excessive charges is the subject of an action”—— Per Maunsty, J. in *Distington Iron Co, Ltd. v. L. and N W Ry. Co.*, 6 Ry. and Ca. Tr. Cas. 108. **Z**

(b) On a Railway Company insisting on the prepayment of illegal rates, threatening at the same time that it would cease to carry the traffic if the rates were not prepaid, *held*, that the Commissioner had no jurisdiction to entertain the question, the complainants having ample remedy in a Court of law Per Huddleston, J in (*Ibid.*) **A**

(3) Railway Commissioners' jurisdiction—Reason for the same.

(a) “Many things in the shape of preference, undue advantage and so on, were not the subject of any proceeding, either criminal or civil.” Per Maunsty, J. in *Distington Iron Co, Ltd v L. and N.W Ry. Co.*, 6 Ry. and Ca. Tr. Cas at p. 131 **B**

(b) “And, in order to meet those cases, powers were given to the Railway Commissioners to arrange as to traffic, as to giving facilities for traffic, and as to preventing undue prejudice and undue favour to different parties.” (*Ibid*) **C**

(c) This has been done “to provide for cases in which there was no remedy. (*Ibid.*) **D**

(4) Passenger fares in excess of authorised fares.

(a) On a Railway Company charging—, *held* that the Commissioners have no jurisdiction to decide the same. *Brown v G W.Ry. Co.*, 8 Ry. and Ca. Tr. Cas. 523. **E**

(b) “If it can be shown that charges were made, either as regards a particular train or as regards a particular station to such an amount as to be calculated to prevent the use of those trains or the traffic to those stations, it would be refusing reasonable facilities for receiving and and forwarding passengers by those trains, and, if it was stated and proved that it was done with the object of preventing the use of the accommodation, that might also give the Railway Commissioners power to entertain the question of the *quantum*, if it was shown either from the excess that it was calculated to have that effect, or that it was done for the ‘purpose of having that result.’”

(*Ibid.*) **F**

I.—“Afford all reasonable facilities....of traffic—(Concluded).”

C.—TRAFFIC—(Concluded).

RAILWAY ADMINISTRATION IS BOUND TO AFFORD ALL REASONABLE FACILITIES FOR RECEIVING, FORWARDING AND DELIVERING TRAFFIC.—(Concluded).

II—Traffic, collection and delivery of. .

(1) Wagons on Company's line—Charge for using the same not allowed.

- (a) Where a Railway Company is not put to some special expense in supplying wagons, *held* that a rate ought not to be increased on that account, since the rate involves the delivery of wagons for use in the ordinary way. *Hall v. L.B. & S.C. Ry. Co*, 4 Ry. and Ca Tr. Cas. 398. **G**
- (b) On a Railway Company making a charge of 2 d. per ton on all traffic forwarded in their wagons from certain stations, for the reason that such wagons or a part of them would be returned empty, *held* that such charge was inadmissible as a terminal charge. (*Ibid.*) **H**
- (c) But, on the use of wagons of defendant Company by the complainant, off the defendant Company's line, the Railway Company has a right to make a charge of 1 d. per ton for such use. *Aberdeen Commercial Co v. Great North of Scotland Ry. Co.*, 3 Ry. and Ca. Tr. Cas. 205 (213). **I**

(2) Railway Company to give notice of arrival of goods.

(a) ENGLISH LAW.

According to the English law, it is the duty of a Railway Company to give notice of arrival of goods to those to whom the goods are directed, for, the time that they ought to call for the goods, is when the carrier is ready to deliver. *Neston Colliery Co. v. L. & N. W & G.W Ry. Cos.*, 4 Ry. and Ca. Tr. Cas. 257. **J**

(b) RULE 5 OF THE RULES FOR THE WAREHOUSING AND RETENTION OF GOODS.

—, made under S. 47 (1) (f) provides that notice will be sent when practicable, but that the Railway Company will accept no responsibility for non-receipt thereof. **K**

(c) TIME WITHIN WHICH TO UNLOAD GOODS.

- (i) According to the English law, 48 hours after receipt of notice is a reasonable time, within which to unload goods. *Coxton v. N. E. Ry. Co.*, (No. 2) 4 Ry. and Ca Tr. Cas. 284. **L**
- (ii) “A wharfage charge may be levied in respect of all goods not removed from Railway premises before closing time of the day, following that on which they are made available for delivery.” [Rule 3 (1) of the Rules for the warehousing and retention of goods made under S. 47 (1) (f), *infra*] **M**

(3) Railway Company not making arrangement for carriage by road.

Where a Railway Company does not make arrangements for the prompt and punctual transport of goods by road to, and from their nearest station, *held*, the Company is not responsible for making carrying arrangement by road in addition to its proper business of carrying by railway. *Dublin and Meath Ry. Co. v. Midland Great Western of Ireland Ry. Co*, 3 Ry. and Ca. Tr. Cas. 379. **N**

**2.—“ Shall not make or give any undue or unreasonable preference
.... whatsoever.”**

RAILWAY ADMINISTRATION IS BOUND TO ABSTAIN FROM MAKING OR GIVING ANY UNDUE PREFERENCE OR ADVANTAGE, OR ANY UNDUE OR UNREASONABLE PREJUDICE OR DISADVANTAGE.

(1) Promise to afford facilities.

A ———, does not affect the parties' right, except so far as it testifies to the reasonableness of the applicants' demand *Holyhead Local Board v. L. and N. W. Ry. Co.*, 4 Ry. and Ca. Tr. Cas. 37. **O**

(2) Reasonable facilities.

The fact of a Railway Company charging beyond their authorized limits does not amount to a refusal to afford—. *Brown v. G. W. Ry. Co.*, 3 Ry. and Ca. Tr. Cas. 523. **P**

(3) Removal of ground of complaint before the filing of application.

Where there has been a removal of the ground of the complaint before the filing of the application, *held*, an injunction will be granted to the applicants for securing their interests in the future. *Macfarlane v. North British Ry. Co.* (No. 2) 4 Ry. and Ca. Tr. Cas. 269 **Q**

(4) “Undue and unreasonable preference or advantage, and prejudice or disadvantage”—Scope of the expression.

“The words———, must be a preference or prejudice with reference to competing parties, an inequality, an unfairness with reference to others, or a prejudice to other works, and cannot apply to the suggestion which has been made that, because there are excessive charges, a prejudice arises to the applicants.” Per Huddleston, B. in *Distington Iron Co., Ltd. v. L. and N. W. Ry. Co.*, 6 Ry. and Ca. Tr. Cas. 108 (124). **R**

(5) Undue preference, or undue and unreasonable prejudice—Instances.

(a) It is an undue preference if a Company allow their agent to receive goods without a ‘forwarding note’ being signed by the consignors, which note the consignors would have had to sign if they had delivered their goods to the complainants or other carriers. *Baxendale v. Bristol and Exeter Ry. Co.*, 1 Ry. and Ca. Tr. Cas. 229 **S**

(b) So also, where a Company, receiving goods from one carrier up to 8 P.M., refuses to receive goods from the public at the station to go by the same train after 5 15 P.M. *Gaston v. Bristol and Exeter Ry. Co.*, 1 Ry. and Ca. Tr. Cas. 218. **T**

(c) So also, where the complainants had to deliver goods collected by them before 6-30 P.M., while the Railway Company accepted goods collected by its own van up to 8 or 9 P.M. *Baxendale v. L. and S. W. Ry. Co.*, 1 Ry. & Ca. Tr. Cas. 231. (but see, *Palmer v. L. and S. W. Ry. Co.*, 1 Ry. & Ca. Tr. Cas. 243). **U**

(d) So also, where a Railway Company refused to carry coals for a colliery owner, unless he had 15 wagons containing a minimum of 4 tons each, while it carried coals for others in smaller quantity. *L. and Y. Ry. Co. v. Gidder* (No. 2) L.R. 7 H.L. 517. **V**

**2.—Shall not make or give any undue or unreasonable preference
.... whatsoever—(Continued).**

RAILWAY ADMINISTRATION IS BOUND TO ABSTAIN FROM MAKING OR GIVING ANY UNDUE PREFERENCE OR ADVANTAGE, OR ANY UNDUE OR UNREASONABLE PREJUDICE OR DISADVANTAGE—(Continued).

(e) So also, where a Railway Company, for the purpose of obtaining the services of the Company as carriers to the exclusion of other carriers, intimates to the public that it would collect and deliver goods free of charge. *Barendale v. G. W. Ry., Co., 1 Ry. and Ca. Tr. Cas. 202, Garton v. G. W. Ry. Co., 1 Ry. and Ca. Tr. Cas. 214* **W**

(f) So also, where rates or certain classes of goods from one station to another had been reduced for sometime, but the applicants were still charged at the previous and higher rates, although the reduced rates were charged to other traders. *Macfarlane v. North British Ry. Co. (No. 2) 4 Ry. and Ca. Tr. Cas. 269.* **X**

(g) So also, where a Railway Company, which makes a charge to the public for the cartage of parcels, and empties and allows such amount to its own carriers and agents, when such services are performed by its carriers or agents, does not allow such charges to other carriers performing similar services. *Goddard v. L. and S. W. Ry. Co., 1 Ry. and Ca. Tr. Cas. 308* **Y**

(h) So also, where a Railway Company refused to act on general order for delivering goods to a carrier, and insisted on a special order being produced in respect of each consignment, but required no order, whether special or general, to be produced by its own carrier. *Parkinson v. G. W. Ry. Co., 1 Ry. and Ca. Tr. Cas. 280* **Z**

(i) So also, where a Railway Company charges a customer for services not rendered. *Garton v. Bristol and Exeter Ry. Co., 1 Ry. and Ca. Tr. Cas. 218* **A**

(j) So also, where a Railway Company evades its obligation of imposing rates equally, by colourably pretending that what is in fact a charge for other things as well as for carriage, is a charge for carriage only. *Barendale v. G. W. Ry. Co., 1 Ry. & Ca. Tr. Cas. 202* **B**

(k) A through rate may constitute an undue preference. *Swindon v. Marlborough Ry. Co. and G. W. and L. & S. W. Ry. Cos., 4 Ry. & Ca. Tr. Cas. 349.* **C**

(l) Where a Railway Company having control over the rates for passenger fares by two routes (including transit by sea), the routes being practically of the same distance, charged the first class fare of £3 by one route and £2. s.7 d.6 by the other route, held that the difference, being excessive, constituted an undue prejudice over the traffic of the former route. *Catly of Dublin Steam Packet Co. v. L. & N. Ry. Co., 4 Ry. and Ca. Tr. Cas. 10* **D**

(6) Undue preference as regards passenger traffic.

The cases relating to—, are few. See *Brown v. C. W. Ry. Co., 3 Ry. and Ca. Tr. Cas. 523* **E**

(7) Undue preference—Monopoly as to goods already delivered.

Monopoly as to goods already delivered is not an—, see *West v. L. & N. W. Ry. Co., 1 Ry. & C. Tr. Cas. 166* (but see *Locke v. N. E. Ry. Co., 3 Ry. and Ca. Tr. Cas. 44.*) **F**

**2.—Shall not make or give any undue or unreasonable preference
.... whatsoever—(Concluded).**

RAILWAY ADMINISTRATION IS BOUND TO ABSTAIN FROM MAKING OR GIVING ANY UNDUE PREFERENCE OR ADVANTAGE, OR ANY UNDUE OR UNREASONABLE PREJUDICE OR DISADVANTAGE—(Concluded).

(8) Question of "fares"—Court's interference.

- (a) Where the fare on one branch line is higher than the fare for an equal distance on another branch line of the same Railway, the Court will not interfere. *Caterham Ry. Co. v. L. B. & S. C. Ry. Co.* (Ry. & Ca Tr. Cas. 32). **G**
- (b) So also, where the fares on a Railway worked by another Railway Company are higher than those charged for a like distance on the latter Railway (unless an undue preference or prejudice is caused thereby). *Inner v. L. B. & S. C. and L. & S. W. Ry. Cos.*, 2 Ry. and Ca. Tr. Cas. 155. **H**
- (c) So also, where the passenger fares from intermediate stations to the termin stations are higher than those between the two termini of the line. *Hozier v. Caledonian Ry. Co.*, 1 Ry. & Ca. 27. **I**

(9) Two or more routes.

- (a) "Where a Railway Company has two or more lines or channels of communication in its own hands, it may conduct the traffic which is left to its own discretion by which one of them it prefers." *Londonderry Port ect., v. Gt. Northern Ry. Co. (Ir.) and others*, 5 Ry. and Ca. Tr. Cas. 282 (284). **J**
- (b) "And so long as it leaves traders also free to select the route they think most convenient, and subjects them to no undue disadvantage or unequal terms in carrying their traffic by the route they select, as compared with the route which itself, so to speak, favours, it does nothing which the Railway Canal and Traffic Act (1888) prohibits." (*Ibid*) **K**
- (c) But facilities on both must be the same. (*Ibid*). **L**
- (d) Whether as to the hours of the trains sailing, or as to the hours being the same on both routes for the reception of the traffic, the Railway Company is bound to see that the service is as good by one route as another. (*Ibid*). **M**
- (e) A Railway Company may disregard the consignor's order as to route, if he is not prejudiced thereby. *Donald v. N.F. Ry. Co.*, 6 Ry. and Ca. Tr. Cas. 53. **N**

(10) Through-traffic—Alternative routes

Where two alternative routes for through-traffic, one similarly longer than the other, have been left open, it is not proper for a Railway Company, for the purpose of a through-rate to propose to carry the traffic by the longer route with the object of making its mileage rate more, and the mileage rate of the forwarding Company less. *East and West Junction Ry. Co. v. G. W. Ry. Co.*, 1 Ry. and Ca. Tr. Cas. 331. **O**

(11) Convenience to the public and the Railway Company.

- (a)—must be taken into consideration. See *Lees v. L. and Y. Ry. Co.* 1 Ry. and Ca. Tr. Cas. 352. **P**
- (b) As to the convenience of the Railway Company being taken into consideration. See, *Cooper v. L. and S. W. Ry. Co.*, 1 Ry. and Ca. Tr. Cas. 185. **Q**

3 —“ Sub-Ss. (3 & 4).”

A RAILWAY ADMINISTRATION IS BOUND TO AFFORD ALL DUE AND REASONABLE FACILITIES FOR RECEIVING AND FORWARDING TRAFFIC IN THE CASE OF CONTINUOUS LINES.

(1) Continuous line of Railway communication.

(a) ENGLISH LAW.

According to the—, a route is not a “continuous line of Railway communication,” until the Board of Trade sanctions the opening of the line. *Hammans Foster and others v. G.W. Ry. Co.*, 4 Ry. and Ca. Tr. Cas. 181. R

(b) INDIAN LAW

The same rule is applicable to India, until sanction, in accordance with the provisions in Ch. IV of the Indian Railways Act, for the opening of the railway is given. S

(2) Continuous communication for the carriage of passengers.

The Commissioners, on a complaint from the passengers, are entitled to make an order enjoining two Railway Companies having stations in the same town situate one mile apart—connected by a line of railway, which line, however, was used for the goods traffic only—, to afford facilities for a continuous communication for the carriage of passengers as well as of goods traffic. *Uckfield Local Board v. L. B. and S. C. and S.M. Ry. Cos.*, 2 Ry. and Ca. Tr. Cas. 214. T

(3) Reasonable amount of accommodation.

In considering what is a—, regard must be had to the convenience of the general traffic of the Railway. *Barret v. G. N. and Mid. Ry. Co.* 1 Ry. and Ca. Tr. Cas. 38. U

(4) Continuous line of communication—Obligation whether limited to cases where a Railway Company has accommodation.

(a) Two Railways formed continuous line of communication. The applicants were prevented from sending their traffic by the same, and had to send their traffic by a circuitous route. Held (1) that the applicants had a right to have their traffic conveyed by whichever route they wished, and to use the two Railways as a continuous line. *Victoria Coal and Iron Co. v. North and Brecon and Mid. Ry. Cos.*, 3 Ry. and Ca. Tr. Cas. 37. Y

(b) The obligation imposed on a Railway Company is not limited to cases where Railway Companies have accommodation to take over the traffic at the point of the junction (*Ibid.*) W

(5) Existence of disputes between Railway Companies.

Disputes between Railway Companies whose lines form a continuous line of communication, serve not as answers to the public who desire to use such lines as a continuous line. *Hammans, Foster, etc. v. G. W. Ry. Co.*, 4 Ry. and Ca. Tr. Cas. 181. X

(6) Through-booking.

The Railway Commissioners cannot, as a matter of right, make an order for—. *Dadcot, Newbury, etc. Ry. Co. v. G.W. and L. and S. W. Ry., Cos.*, 10 Ry. and Ca. Tr. Cas. 1. Y

3.—“Sub-Ss. (3 & 4)”—(Continued).

A RAILWAY ADMINISTRATION IS BOUND TO AFFORD ALL DUE AND REASONABLE FACILITIES FOR RECEIVING AND FORWARDING TRAFFIC IN THE CASE OF CONTINUOUS LINES—(Continued).

(7) Right of customer—Single booking.

- (a) A customer is entitled to require any number of companies to combine to form a continuous route, by which his traffic may be sent at a single booking and for a single payment. *G.W. Ry. Co v. Severn and Wye etc Ry Co*, 5 Ry. and Ca. Tr. Cas. 170. **Z**
- (b) So also, the Railway Commissioners are entitled to order through-booking of passengers at the sum of the local rates charged on two lines of railway constituting the through route. *Dudcot, Newbury and Ry. Co v. L. and S.W. Ry. Co* (No. 2) 10 Ry. and Ca. Tr. Cas. 9. **A**
- (c) This is the case even though the service may not be continuous by the same train, or by a connection between trains. *Tynes v. L.B. and S.C. and L. and S. Ry. Cos*, 2 Ry. and Ca. Tr. Cas. 155 (167). **B**
- (d) But see *Barret v. G.N. and Mid. Ry. Co*, 1 Ry. and Ca. Tr. Cas. 38, where an application for through-booking in the case of passenger traffic was refused. **C**

(8) Route—Reasonable.

- (a) The route to be granted must be a reasonable one. See *East and West Junction Ry. Co. v. G.W. Ry. Co*, 1 Ry. & Ca. Tr. Cas. 331; *Salisbury Ry. Co v. North British Ry. Co* (No. 4) 3 Ry. and Ca. Tr. Cas. 403. **D**
- (b) “A route that would be serviceable if worked throughout by one Company, does not lose its serviceableness, because two or more companies are concerned in working at it.” *Swindon and Marlborough Ry. Co v. G.W. and L. and S.W. Ry. Cos* 4 Ry. and Ca. Tr. Cas. 349 (353). **E**

(9) Through routes—Competition, reasonableness of.

- (a) Where a route can maintain a competition with quicker and cheaper routes, and is efficient enough to be likely to be preferred for some portion of the traffic, held that such a route is reasonable. *G.W. Ry. Co. v. Severn and Wye etc. Ry. Co* 5 Ry. and Ca. Tr. Cas. 170. **F**
- (b) “*in facie*, it is in the interest of the public that there should be at least two routes open between any two given places, provided that those routes are practically independent of one another, fairly alternative, and reasonably calculated to keep one another in check.” (*Ibid*) (193). **G**
- (c) “Mere paper competition would not be for the public interest, nor would such competition be for the interest of the public, if it could only be maintained on terms ruinous to one or both of the competing companies.” (*Ibid*) **H**
- (d) “Healthy competition would be generally in the public interest, and, at any rate there would certainly be a presumption in its favour, which it would be for the Company alleging that it was not in the public interest to displace by evidence.” (*Ibid*). **I**

3.—“Sub-Ss. (3 & 4)”—(Continued).

A RAILWAY ADMINISTRATION IS BOUND TO AFFORD ALL DUE AND REASONABLE FACILITIES FOR RECEIVING AND FORWARDING TRAFFIC IN THE CASE OF CONTINUOUS LINES—(Contd)

(10) Line being opened forming alternative routes—Distance and cost of carriage lessened—Effect.

- On a line being opened forming alternative routes, by which distance and cost of carriage are lessened, it is reasonable that rates charged to the public, who are in a position to avail themselves of the shorter route, should be also in some measure reduced. *East and West Junction Ry. Co. v. G. W. Ry. Co* 2 Ry. and Ca. Tr. Cas. 147 (153) **J**

(11) Route when not a reasonable one.

Where the station where it is proposed to exchange the traffic is not, in any reasonable sense, a practicable one for that purpose, the route cannot be called a reasonable one. *Plymouth Etc. Ry. Co. v. G. W. and L. and S. W. Ry. Cos.* 10 Ry. and Ca. Tr. Cas. 68 **K**

(12) Through rate—Undue preference.

A through-rate must not constitute an undue preference. *Swindon and Marlborough Ry. Co. v. C. W. and L. and S. W. Ry. Cos.*, 4 Ry. and Ca. Tr. Cas. 349. **L**

(13) Quantum of proposed through rate

(a) Though the Commissioners may think that some other amount would be more equitable, they must accept the proposed rate, unless they are prepared to refuse the rate altogether. *G. W. Ry. Co. v. Severn and Wye, Etc. Ry. Cos.*, 5 Ry. and Ca. Tr. Cas. 170 **M**

(b) “We have no discredit as to *quantum* unless we can say that that the rates proposed are (i) unreasonably high as against the public, and it would require a very strong case to make us say, in the absence of any lower rates by any other route, that the proposed rates were too high, or (ii) so low as to be unfair to the resisting company, all we can say in such a case, all we did say on the former occasion, and all we propose to say in the present case on this question is this —There is nothing so unreasonable in the amount proposed as to render a rate, which in other respects is reasonable, unfit for us to sanction.” (*Ibid*) **N**

(14) Granting a through-rate—Public interest.

(a) No through-rate will be granted, if it is not shown that it is required for public interest. *Belfast Central Ry. Co. v. Gt. Northern Ry. Co.*, (11.) (No. 3), 4 Ry. and Ca. Tr. Cas. 159. **O**

(b) A case of special interest as well need not be proved, when a *prima facie* case of public interest is made out. *Central Wales, etc. Ry. Co. v. G. W. Ry. Co.*, 4 Ry. and Ca. Tr. Cas. 110. **P**

(c) However, it is not competent for the Court to consider the public interest alone in a competitive route. it will consider also the right of a railway company for a long run *re* traffic originating on its own system. *Plymouth, etc. Ry. Co. v. G. W. and L. and S. W. Ry. Cos.*, 10 Ry. and Ca. Tr. Cas. 68. **Q**

3.—“Sub-Ss. (3) & (4)” —(Continued).

A RAILWAY ADMINISTRATION IS BOUND TO AFFORD ALL DUE AND REASONABLE FACILITIES FOR RECEIVING AND FORWARDING TRAFFIC IN THE CASE OF CONTINUOUS LINES—(Continued).

(15) Through rate—Customer.

(a) ENGLISH LAW.

According to the—, any customer desiring his traffic to be carried at a through-rate, is competent to apply to the Board of Trade under the terms of S. 25, of the Railway and Canal Traffic Act, 1888. See *G. W. Ry. v. Severn and Wye. etc. Ry. Co.*, 5 Ry. and Ca. Tr. Cas. 170 (174). **R**

(b) INDIAN LAW.

- In India, however, customers have no such right. **S**

(16) Through rates, company entitled to apply for.

(a) A railway company which has an interest in a through-route, has the right to apply, though its proposals would be more of a detriment to the other companies than benefit to itself *Severn and Wye etc. Ry. Co. v. G. W. Ry. Co.*, 5 Ry. and Ca. Tr. Cas. 156. **T**

(b) It need not be the forwarding company, even if the company has some interest in the forwarding of traffic. *Greenock and Wemyss Bay Ry. Co. v. Caledonian Ry. Co.*, (No 3), 2 Ry. and Ca. Tr. Cas. 227. **U**

(c) Though a railway company does not act as carriers of the traffic it forwards, yet it may be called a ‘forwarding company.’ *Warwick and Birmingham Canal Co. v. Brun. Canal Co.*, 3 Ry. and Ca. Tr. Cas. 113. **V**

(d) So also a company whose line is worked by another company. *Greenock and Wemyss Bay Ry. Co. v. Caledonian Ry. Co.* (No. 3), 3 Ry. and Ca. Tr. Cas. 145. **W**

(17) Through rate—Through booking.

(a) “There may be an application to the Commissioners for a through-rate, but such an application would not be made unless the rate asked for is one that is less in amount than the aggregate of the rates over the different parts of the route.” (Per *Rugby, L.J.*, *concurring* and *Loper L. J.*, *dissenting*) in *Dudcot, Newbury, etc., Ry. Co. v. G. W. and L. S. W. Ry. Cos.* 10 Ry. and Ca. Tr. Cas. 1 Lord Esher M.R. **X**

(b) “The Commissioners may grant a through-rate, but in doing so, they must consider public convenience and other matters” (*Ibid.*) **Y**

(c) “If they grant a through-rate, it seems to follow, as a matter of necessity, that this must be a through-booking.” (*Ibid.*) **Z**

(d) “The converse seems to be equally true, that, if a through-booking is asked for, it must be taken into consideration; then, if it is granted, it follows a matter of necessity that there must be a grant of a rate corresponding to the booking” (*Ibid.*) **A**

• (e) “If the Commissioners think that a through-booking is to the advantage of the public, and they do not wish to interfere with the amount of the rate, it will, by the granting of the booking, be a rate payable for the through-journey, which is, in ordinary language, a through-rate.” (*Ibid.*) **B**

3.—“Sub-Ss. (3 & 4)”—(Continued).

A RAILWAY ADMINISTRATION IS BOUND TO AFFORD ALL DUE AND REASONABLE FACILITIES FOR RECEIVING AND FORWARDING TRAFFIC IN THE CASE OF CONTINUOUS LINES.

- (f) “It will be one rate made up of the amounts of the rates over the different portions of the route.” (*Ibid.*) **C**
- (g) “If the Commissioners consider that there should be less paid than the aggregate of the local rates, then, they will grant a reduced rate, and if you choose, you can call that a through-rate and that only.” (*Ibid.*) **D**
- (h) “It seems to be a needlessly wrong way of criticising a very general and easy term in the English language.” (*Ibid.*) **E**
- (i) “If you grant a lesser rate, then, if you like, in railway language, it is a through-rate; but if you leave the amount of the rates alone, and add them together and make one rate of it, then, you have granted a through-booking and a through-rate.” (*Ibid.*) **F**
- (j) “Subject to the consideration of the conditions and limitations imposed by statute, they can either grant that by saying they grant a through-booking, or by saying they grant a through-rate. If they grant either one or the other, they must of necessity grant both.” (*Ibid.*) **G**

(18) Through traffic—Right of a railway company.

The right of a Railway Company, outside the question *re* through-rates, is to collect what traffic it can, to carry it as far as it can, and to hand it over at the end of the transit, to any other company having the obligation to carry upon. *G. W. Ry. Co. v. Severn and Wye etc. Ry. Co.*, 5 Ry. and Ca. Tr. Cas. 170. **H**

(19) Adjustment of rates—Competing companies, interests of

While adjusting their rates, railway companies must do so not only with reference to their own interests, but also with reference to the interests of other companies. *Great Northern Ry. Co. (L) v. Belfast Central Ry. Co.*, 3 Ry. and Ca. Tr. Cas. 411. **I**

(20) Through-rates—Apportionment how made.

The usual way in which through-rates between railway companies are apportioned, is to make a division of the through-rate by the mileage, after deducting terminals. *Severn and Wye Etc. Ry. Co. v. G. W. Ry. Co.*, 5 Ry. and Ca. Tr. Cas. 156 (166) **J**

(21) Traffic carried beyond junction—Through rates—Apportionment.

As to the apportionment of through-rates, when traffic has to be carried beyond junction, see *Central Wales, Etc., Ry. Co. v. L. and N. W. Ry. Co.*, 4 Ry. and Ca. Tr. Cas. 101; *Buckfastleigh, etc., Ry. Co. v. South Devon Ry. Co.*, 1 Ry. and Ca. Tr. Cas. 321. **K**

(22) Break of gauge—Transfer of traffic.

The Commissioners, in a case wherein the traffic has to be transferred at a junction on account of a break of gauge while apportioning a through-rate, allowed charge for the service of transfer to the company performing the same. *Tal-y-llyn Ry. Co. v. Cambrian Ry. and Co.*, 5 Ry. and Ca. Tr. Cas. 122 (124). **L**

3.—“*Sub-Ss. (3, (a) 4)*”—(Concluded).

A RAILWAY ADMINISTRATION IS BOUND TO AFFORD ALL DUE AND REASONABLE FACILITIES FOR RECEIVING AND FORWARDING TRAFFIC IN THE CASE OF CONTINUOUS LINES—(Concluded).

(23) **Power given by one company to another to use its railway and the works belonging to it, nature of**

A railway company, giving to another railway company power to use its railway and the works belonging to it, undertakes to perform all those services which must be performed, if the privilege given is to be exercised at all. (*G. W. and Mid. Ry. Cos. v. Bristol Port Ry. and Pier Co.* 5 Ry. and Ca. Tr. Cas. 94. **M**)

43. (1) Whenever it is shown that a railway administration charges one trader¹, or class of traders or the traders in any local area lower rates for the same or similar animals or goods, or lower rates for the same or similar services, than it charges to other traders or classes of traders, or to the traders in another local area, the burden of proving that such lower charge does not amount to an undue preference² shall lie on the railway administration.

Undue preference in case of unequal rates for like traffic or services.

(2) In deciding whether a lower charge does or does not amount to an undue preference, the Commissioners may, so far as they think reasonable, in addition to any other considerations affecting the case, take into consideration whether such lower charge is necessary for the purpose of securing, in the interests of the public³, the traffic in respect of which it is made.

Old Acts

Act IV of 1879) No corresponding provision.
Act XVIII of 1854	

(Notes).

General.

(1) Analogous provision

Cf.—S. 27, the Railway and Canal Traffic Act, 1888 (51 and 52 Vic. c. 25). **N**

(2) Effect of section.

The effect of S. 27, the Indian Railway and Canal Traffic Act, 1888 (*Cf.* present section), is not to limit the Court in dealing with questions of alleged undue preference to the consideration whether or not the lower charge is necessary in the interests of the public. *Liverpool Corn Traders' Association v. G. W. Ry. Co.* 8 Ry. and Ca. Tr. Cas. 114. **O**

1.—“*Trader.*”**Trader, meaning of.**

(a) INDIAN LAW.

Nowhere in the Act is the term trader, defined. P

(b) ENGLISH LAW.

The term trader includes any person sending, receiving, or desiring to send merchandise by railway, (S. 55, Railway and Canal Traffic Act, 1888). Q

2 —“*Undue preference*”(1) “*Undue preference,*” defined

(a) INDIAN LAW.

Nowhere in the Act is the term “undue preference” defined. R

(b) ENGLISH LAW.

The expression “undue preference” includes an undue preference or an undue or unreasonable prejudice or disadvantage, in any respect, in favour of, or against any person or particular class of persons or any particular description of traffic (S. 55, the Railway and Canal Traffic Act, 1888). S

(2) *Undue preference—Question of fact*

What amounts to undue preference is generally not a question of law, but one of fact. *Diphwys Casson Slate Co. v Festunoq Ry. Co.*, 2 Ry. and Ca. Tr. Cas. 73 (81). T

(3) *Undue preference—Instances*

(a) (i) An agreement by a Railway Company to carry the traffic of a colliery owner at a reduced rate, on his threatening the Company that he will divert his traffic from the Railway Company's line unless the Company agreed to carry the same at the reduced rate was held to be an —. *Harris v Cockermonth etc Ry Co.*, 1 Ry. and Ca. Tr. Cas. 97. U

(ii) Not so an agreement for carrying at a lower rate in consideration of large quantities at regular intervals. *Nicholson v. G. W. Ry. Co.*, 1 Ry. and Ca. Tr. Cas. 121. V

(b) (i) An agreement to carry traffic for one trader at a lower rate than similar traffic belonging to another trader, is *prima facie* an —, the inequality not being justified by the fact of the Railway Company having offered an agreement to the latter at similar rates. *Rhymney Iron Co v Rhymney Ry. Co*, 6 Ry. Ca. Tr. Cas. 60. W

(ii) Not so where a trader, in the absence of proof, is charged a smaller rate than that charged to a competitor. *Greenwood v. L. and Y. Ry. Co.*, 6 Ry. and Ca. Tr. Cas. 60. X

(c) “The fact of a customer of a Railway engaging to employ other lines of the Company for traffic distinct from and unconnected with the goods in question or their carriage, is not a legitimate ground for giving an — to one of the customers of the railway. *Baxendale v. G. W. Ry. Co.*, 1 Ry. and Ca. Tr. Cas. 191. Y

(d) So also an agreement by the customer to send his goods by the defendant's company's railway, and not by water on other railway companies. *Garton v. Bristol and Exeter Ry. Co.*, 1 Ry. and Ca. Tr. Cas. 218. Z

(e) Gratuitous carting, loading and unloading was held to be an —. *L. and N. W. Ry. Co. v. Evershed*, 48 L. J. Q. B. 22. A

2.—“Undue preference”—(Continued).

(f) “It would seem that where a Company carry grain to two towns, at neither of which they perform certain terminal services for their customers, it is an— in favour of the traders at one town to allow a deduction in respect of such services not being performed by the Company, if the same deduction is not also allowed to the traders of the other town.”
Thrope v. Midland Ry. Co., 11 Rep. Ry. Com. 1. **B**

(g) If goods of the same classification as to rates are carried in different directions, it is an—to charge different rates for the same distance according to the direction in which such goods may be going. • *Greenwood v. L. and Y. Ry. Co.*, 6 Ry. and Ca. Tr. Cas. 39. **C**

(4) Interests of railway to be taken into account.

(a) Where the Commissioners want to decide the question whether a Railway Company has given an undue preference, or has subjected any person, company or traffic to an undue prejudice, they should consider the interest of the Railway. *Ransome v. Eastern Co. Ry. Co.* (No. 1) 1 Ry. and Ca. Tr. Cas. 63. **D**

(b) Similarly a Railway Company may carry traffic for one at a less rate than similar traffic for another, provided the circumstances are such as to render the cost of cartage for the former less than for the latter. *Oxlade v. N. E. Ry. Co.* (No. 1) 1 Ry. and Ca. Tr. Cas., 72. **E**

(c) Likewise, the Commissioners must take into account whether a Railway Company might not, for deriving equal profits to itself, carry traffic in large quantities at lower rates per ton per mile than small quantities, and for long distances at lower rates than for shorter distances. (*Ransome v. Eastern Co. Ry. Co.* (No. 1) 1 Ry. and Ca. Tr. Cas. 63). **F**

(d) For a case where a reduced rate was allowed for iron, one but was refused for coal traffic, See *Rhymney Iron Co. v. Rhymney Ry. Co.*, 6 Ry. and Ca. Tr. Cas. 60. **G**

(5) Equal treatment.

“—does not consist in all being offered a similar agreement, for if the agreement is not for the public interests, or goes beyond the fair regard which a Company may pay to its own interests, it leaves untouched the right of all under the Traffic Act to be put on equal terms”
Diphwys Casson Slate Co. v. Festinog, 2 Ry. and Ca. Tr. Cas. 73 (79). **H**

(6) Rebate.

Rebate (discount, deduction from a payment in consideration of its being made before it falls due), if allowed, must be equal. See *Bell v. L. and N. W. Ry.* 10, 2 Ry. and Ca. Tr. Cas. 185. **I**

(7) Charge for warehousing.

(a) In a railway rate, a—must not be included. See *Greenwood v. L. and Y. Ry. Co.*, 6 Ry. and Ca. Tr. Cas. 39. **J**

(b) *Semle*:—A Railway Company ought to permit all an equal period of warehousing. *Ibid.*, Per Sir Frederick Peel. **K**

(c) “This expense of—seems to be an expense incurred by the Railway Company, not as carriers but as warehousemen, and I do not think that a warehouse expenditure is a proper ingredient in a railway rate.” (*Ibid.*) **L**

2.—“*Undue preference*”—(Continued).

- (d) “If the Railway Company choose to allow free warehousing for 28 days, and they think the applicants have made a freer or longer use of that ~~indulgence than they expected~~, they have the remedy in their own hands. They can, if they please, provided they treat all persons alike, curtail the time which they allow for free warehousing, and, when that time is exceeded, make a charge for the overtime.”
(*Ibid.*) M

(8) Carriage of goods—Railway Company making special agreement with customers.

- (a) It is within the power of a Railway Company to make some special agreements with the customers, to secure certain advantages to them *re* the carriage of goods. *Nicholson v. G. W. Ry. Co*, 1 Ry. and Ca. Tr. Cas. 121. N
- (b) Such agreements will hold good only under the following circumstances —
- (i) It must be clear that agreements are in the interests of such customers,
- (ii) They must also be made with the object of increasing the profits of a railway;
- (iii) The Company must be willing to enter into similar agreements for the same facilities with all other persons. (*Ibid.*) O

(9) Railway Company, whether can agree, to carry at reduced rates

For the simple reason that a Railway Company wants to introduce a certain kind of traffic into a country, it cannot enter into special agreements with different traders to carry at a lower rate than the ordinary charge. *Oxlade v. N. E. Ry. Co*, 1 Ry. and Ca. Tr. Cas. 72. P

(10) One town preferred to another—Jurisdiction

Where a complaint of undue preference being shown to one town over another is made by a corporation, held that the Railway Commissioners have jurisdiction to enquire into the same. *Corporation of Dover v. S. E. and L. C. and D. Ry. Cas.* 1 Ry. and Ca. Tr. Cas. 319 Q

3.—“*Public.*”

“Public,” scope of the term.

- (a) The public referred to is the public of the locality or district affected. *Liverpool Corn Traders' Association v. G. W. Ry. Co.*, 8 Ry. and Ca. Tr. Cas. 114. R
- (b) Any considerable proportion of the population in general, as opposed to an individual or association of individuality, satisfies the description. (*Ibid.*) S

Miscellaneous.

(1) Removal of the ground of complaint before the application.

Even after the—, the applicants can get an injunction to secure their interests in the futuro. *Macfarlane v. North British Ry. Co.* (No. 2), 4 Ry. and Ca. Tr. Cas. 269. T

(2) Promise to afford facilities—Effect.

Where a promise to afford facilities is made, such promise does not affect the rights of the parties under the Railway and Canal Traffic Act, 1888, except so far as it testifies to the reasonableness of what the applicants ask for. *Hobghead Local Board v. L. and N. W. Ry. Co.*, 4 Ry. and Ca. Tr. Cas. 37. U

(3) Charge *re* heavy gradient.

Semble.—Where the cost of working a portion of a line is increased through a heavy gradient, an extra charge per ton per mile may be charged.

See *Town Commissioners of Newry v. Great Northern Ry. Co. (Ir.)*, 7 Ry. Ca. Tr. Cas. 184 (197). Y

44. Where a railway administration is a party to an agreement¹ for procuring the traffic of the railway to be carried on any inland water by any ferry, ship, boat or raft which does not belong to or is not hired or worked by the railway administration, the provisions of the two last foregoing sections applicable to a railway shall extend to the ferry, ship, boat or raft in so far as it is used for the purposes of the traffic of the railway.

Provision for facilities and equal treatment where ships or boats are used which are not part of a railway

Old Acts.

Act IV of 1879 ...)
Act XVIII of 1854 ...)

No corresponding provision.

(Notes).

N B.—See notes to Ss. 42, 43, *supra*.

W

General**(1) Analogous provision**

Cf—S. 25, the Railway Canal and Traffic Act, 1868. (51 and 52 Vict. c. 25). **X**

(2) Section. effect of

Where any railway administration is a party to an agreement for the carriage of traffic on any inland water by any ferry, ship, boat or raft not belonging to, or not hired or worked by the railway administration, the provisions of Ss. 42 and 43, *supra*, apply to the same, *viz*—

- (i) The duty to afford all reasonable facilities for receiving, forwarding and delivering traffic (S. 42 (1), *supra*).
- (ii) The duty to abstain from making or giving any undue preference or advantage or any undue or unreasonable prejudice or disadvantage. (S. 42 (2), *supra*).
- (iii) The duty to afford all reasonable facilities for receiving and forwarding through traffic, *i. e.*, (S. 42 (3) and (4), *supra*).
- (iv) Whenever it is shown that the persons conducting any ferry, ship, boat, or raft, charge one trade or class of traders or the traders in any local area, lower rates for the same or similar animals or goods, or lower rates for the same or similar services, than they charge to other traders or classes of traders, or to the traders in another local area, the burden of proving that such lower charge does not amount to an undue preference lies on the person conducting the ferry, ship, boat or raft. (S. 43, *supra*). Y

I.—“ Agreement. ”

(1) Agreement, nature of.

- (a) The agreement between the Railway Company and the owner of a ship must be definite, so as to constitute an usiug. *Caledonian Ry. Co v. Greenock and Wemyss Bay Ry. Co*, 4 Ry. Ca. & Tr. Cas 70 **Z**
- (b) An obligation on the part of the owner of ship to run between two specified places must be created by the agreement (*Ibid.*) **A**
- (c) The agreement may be temporary only. *Belfast Central Ry. Co. v. Great Northern Ry. Co.* [Ir. (No. 4), 4 Ry. and C. Tr. Cas. 379] **B**

(2) Rate to be equal.

In a case in which a Railway Company carries traffic to two ports, *held*, that the rates in respect of the same must be in proportion to the distance on both lines. *Apn Harbour Trustees v. G. & S. W. Ry. Co.* (No. 2), 4 Ry. & Ca. Tr. Cas. 90. **C**

45 A railway administration may charge reasonable terminals **1**.

Old Act.

This section is new.

(Note).

I.—“ Terminals. ”

(N B—See notes to S. 46, *infra*)

(1) Law before the passing of the Act.

There was no statutory provision as to the charging of terminals, before the passing of the Railway Act, 1890 (IX of 1890) **D**

(2) Practice to make terminal charges.

But, for sometime past the practice for railway administration had been to make terminal charges **E**

46. (1) The Governor-General in Council may, if he thinks fit, refer to the Commissioners for decision any question or dispute which may arise with respect to the terminals charged by the railway administration, and the Commissioners may thereupon decide what is a reasonable sum to be paid to the railway administration in respect of terminals.

(2) In deciding the question or dispute, the Commissioners shall have regard only to the expenditure reasonably necessary to provide the accommodation in respect of which the terminals are charged, irrespective of the outlay which may have been actually incurred by the railway administration in providing that accommodation.

Power of Railway Commission to fix terminals. **1**

Old Acts.

Act IV of 1879 }
 „ XVIII of 1854 } No corresponding provision.

(Notes).**Analogous provision.**

(a) SUB. S. (1).

Cf. S. 15, "The Regulations of Railways Act, 1873" (36 and Vic 37. c. 481). F

(b) SUB. S. (2).

Cf. S. 24 (1), "The Railway and Traffic Act, 1888" (51 and 52 Vic. c. 25) G

I — "Power of Railway Commission to fix terminals."**(1) Terminal charges.**

(a) As to what are—. See *Hall and Co. v. London, Brighton and South Coast Railway Co.*, L R. 15 Q B.D. 505. H

(b) 'Terminal charge' means the charge for the use of the goods, station, and for the various duties which the Company, as common carriers, perform in connection with the goods consigned to them for carriage. The Railway Company is entitled to levy terminal charges on the goods carried by them subject only, as to the rates and amounts thereof, to the sanction of Government, and under Ss 41, 45 and 46 of Act IX of 1890, the High Court has no jurisdiction to consider or entertain a claim relating to terminals charged by the Company subsequent to that Act. 15 B. 537 (541 & 542). I

(c) "Terminal charges" are usually levied on account of the carrying of the goods to and from the wagon, loading and unloading them on and from the wagon, and for the use of the Company's premises where the goods frequently remain for sometime before they are taken away. Such charges if not strictly perhaps "tolls", are certainly charges for performing of services, if not "necessary," at least "convenient" for the working of the Railway. 16 B. 434 (on appeal from 15 B. 537). J

(2) Authority to charge terminals, nature of.

(a) An authority to charge terminals must be express. See *Fegler v. Monmouthshire Ry. Co.*, 30 L.J. Ex. 249. K

(b) By its special Act, a Railway Company was required to carry, as common carriers. It was also required to give to all persons conveying or sending goods on the railway, every reasonable convenience and facility for loading and unloading goods. The Act further authorised the Company to demand a toll not exceeding 3d. per ton per mile for the carriage of goods. On the Company charging 1 sh. per ton for services performed, accommodation afforded, and expenses and rise incurred in and about the receiving, loading and unloading, and delivering the goods, *held*, that the Company had no right to make such charges. (*Ibid.*) L

I—"Power of Railway Commission to fix terminals"—(Continued).

(3) Charge allowed—Instances.

- (a) A Railway Company entitled to make a reasonable charge "for loading, covering, and unloading, and for delivery and collection, and any other services incidental to the business or duty of a carrier, where such services or any of them are, or is performed by the said Company," has the right to make a reasonable charge (1) for share of expenses of providing and maintaining station accommodation for dealing with merchandise traffic as carriers and (2) for share of expenses of station attributable to carrier's services. *Sowerby v. G.N. Ry. Co.*, 7 Ry. and Ca. Tr. Cas. 156. **M**
- (b) A charge for providing, maintaining and working, signalling and inter-locking apparatus at a private siding, may be made. *Dunkirk Colliery Co. v. G.S. and L. Ry. Co.*, 2 Ry. and Ca. Tr. Cas. 402. **N**
- (c) So also one for weighing coal, although the plaintiffs had no express statutory power to charge for the use of weighing machines. *L. and N.W. Ry. Co. v. Price*, L.R., 11 Q.B.D. 485. **O**
- (d) Also one for shunting (locomotive power, horses, staff, and stores) as attributable to carrier's services. *Sowerby v. G.N. Ry. Co.*, 7 Ry. and Ca. Tr. Cas. 156. **P**
- (e) So also where the necessity for shunting was due to the inconvenient position of a private siding *Portway v. Colne Valley etc. and G.E. Ry. Co.*, 10 Ry. and Ca. Tr. Cas. 211. **Q**
- (f) So also a charge for share of expenses of supervision and clerkage. *Sowerby v. G.N. Ry. Co.*, 7 Ry. and Ca. Tr. Cas. 156. **R**
- (g) For clerkage in respect of traffic at a private siding, see *Portway v. Colne Valley etc. and G.E. Ry. Cos.*, 10 Ry. and Ca. Tr. Cas. 211. **S**
- (h) For cartage, when performed by the Railway Company. *Sowerby v. G.N. Ry. Co.*, 7 Ry. and Ca. Tr. Cas. 156. **T**
- (i) A charge to the Company for performing the service of transfer of traffic at break of gauge. *Tal-y-llyn Ry. Co. v. Cambrian Ry. Co.*, 5 Ry. and Ca. Tr. Cas. 122 (124). **U**

(4) Charge disallowed—Instances.

- (a) A Railway Company was entitled to make a charge "for loading, unloading and covering, and the delivery and collection of goods, and other services incidental to the business of carrier, where such services, respectively, shall be performed by the Company." If the service was incidental to conveyance, and for which no charge could be made under the above clause, a charge for station accommodation would be disallowed. *Kempson v. G.W. Ry. Co.*, 4 Ry. & Ca. Tr. Cas. 426. **V**
- (b) Likewise, a charge for providing and maintaining roads for egress and ingress of carts and horses sent to carry away coal traffic, was disallowed. *Isle of Wight (Newport Junction) Ry. Co. v. Isle of Wight Ry. Co.*, 4 Ry. & Ca. Tr. Cas. 128. **W**

1—"Power of Railway Commission to fix terminals"—(Continued).

- (c) So also one for providing, maintaining and working, signalling and interlocking apparatus at a junction with a branch line colliery, which branch line belonged to, and was constructed and maintained at the Railway Company's cost. *Neston Colliery Co. v. L. & N. W. & G. W. Ry. Cos*, 4 Ry. & Ca. Tr. Cas. 257. **X**
- (d) Also one for allowing coals to remain on some ground adjoining the defendant company's line. *L. and Y. Ry. Co. v. Gidlow*, (No. 2), 45 L. J. Ex. 625 **X1**
- (e) 1 Also one for marshalling coal traffic at the defendant company's station. *Isle of Wight (Newport Junction) Ry. Co. v. Isle of Wight Ry. Co.*, 4 Ry. and Ca. Tr. Cas. 128. **X2**
- 11 And on the defendant company's siding *Neston Colliery Co. v. L. and N. W. and G. W. Ry. Cos.*, 4 Ry. and Ca. Tr. Cas. 257. **Y**
- (f) So also for taking empty wagons from, and placing full wagons on sidings. (*Ibid*) **Z**
- (g) So also a charge for finding, providing, and maintaining siding accommodation. *Isle of Wight (Newport Junction) Ry. Co. v. Isle of Wight Ry. Co.*, 4 Ry. and Ca. Tr. Cas. 128. **A**
- (h) Similarly a charge for unloading platforms for coal traffic. (*Ibid*) **B**
- (i) A charge for providing for hop traffic. *Ferry v. L. C. and D. Ry. Co.*, 4 Ry. and Ca. Tr. Cas. 310. **C**
- (j) A charge by a Railway Company entitled to make a "reasonable charge for loading and unloading goods," for sheeting and for covering hops. *Perry v. L. C. & D. Ry. Co.*, 4 Ry. and Ca. Tr. Cas. 310. **D**
- (k) A charge for giving notice to the consignee of the arrival of consignment. *Isle of Wight (Newport Junction) Ry. Co. v. Isle of Wight Ry. Co.*, 4 Ry. & Ca. Tr. Cas. 128. **E**
- (l) For advising an applicant at his request of the arrival of goods at the receiving station consigned to his order, and which were afterwards forwarded on. *Kempson v. G. W. Ry. Co.*, 4 Ry. & Ca. Tr. Cas. 426 **F**
- (m) A charge by a Company, entitled to charge "a reasonable sum for the delivery and collection of goods, and other services incidental to the business of a carrier", for shunting trucks containing coals. *Isle of Wight (Newport Junction) Ry. Co. v. Isle of Wight Ry. Co.*, 4 Ry. & Ca. Tr. Cas. 128. **G**
- (n) Likewise, a charge for shunting and placing wagons in position for loading and unloading, and for haulage of loaded wagons to the place where they were attached for the train. *Kempson v. G. W. Ry. Co.*, 4 Ry. & Ca. Tr. Cas. 426. **H**
- (o) For invoicing and taking accounts of consignments, and keeping a staff for that purpose. *Isle of Wight (Newport Junction) Ry. Co. v. Isle of Wight Ry. Co.*, 4 Ry. & Ca. Tr. Cas. 128. **I**
- (p) For providing and maintaining office accommodation re coal traffic. (*Ibid*) **J**

1.—“Power of Railway Commission to fix terminals” —(Concluded).

(g) For clerkage and watching. *Perrys v. L. C. and D. Ry. Co.*, 4 Ry. and Ca. Tr. Cas. 310. **K**

(r) A charge by a Railway Company, entitled to make “a reasonable charge for loading and unloading goods,” for weighing and checking. (*Ibid.*) **L**

(s) So also a charge for weighing, by a Railway Company entitled to make a charge “for loading, covering and unloading, and for delivery and collection.” *Hall v. L. B. and S. C. Ry. Co.*, 4 Ry. and Ca. Tr. Cas. 310. **M**

(5) Rate not to be increased.

There should not be an increase in the rate, by a charge for a supply of wagons, unless the Railway Company is put to some special expense on that score. *Hall v. L. B. and S. C. Ry. Co.*, 4 Ry. and Ca. Tr. Cas. 308 **N**

(6) Terminals—Rebate.

(a) Where a customer claims a rebate on the charge for carriage, on the plea that he does not require station services to be performed (such services the Company performing for other customers, the charge for the same being included in that for conveyance) *held*, that he is not entitled to such a rebate. *Howard v. Midland Ry. Co.*, 3 Ry. and Ca. Tr. Cas. 253. **O**

(b) But, in *L. and Y. Ry. Co. v. Gullow* (No 1), 44 L. J. Ex. 129, *held*, that a customer must have the option of availing himself of such services as are incidental to the ordinary business of a carrier at the rates of the Company, or of performing them himself. **P**

CHAPTER VI.

WORKING OF RAILWAYS.

General.

47 (1) Every railway company, and, in the case of a railway administered by the Government, an officer to be appointed by the Governor-General in Council in

General rules.

this behalf, shall make general rules,¹ consistent with this Act for the following purposes, namely —

(a) for regulating the mode in which, and the speed at which, rolling-stock used on the railway is to be moved or propelled; ²

(b) for providing for the accommodation and convenience of passengers, and regulating the carriage of their luggage;

(c) for declaring what shall be deemed to be, for the purposes of this Act, dangerous or offensive goods, and for regulating the carriage of such goods;

- (d) for regulating the conditions on which the railway administration will carry passengers suffering from infectious or contagious disorders, and providing for the disinfection of carriages which have been used by such passengers.
- (e) for regulating the conduct of the railway servants ;³
- (f) for regulating the terms and conditions on which the railway administration will warehouse or retain goods at any station on behalf of the consignee or owner⁴ and,
- (g) generally, for regulating the travelling upon, and the use, working, and management of, the railway.⁵

(2) ⁶ The rules may provide that any person committing a breach of any of them shall be punished with fine which may extend to any sum not exceeding fifty rupees, and that, in the case of a rule made under clause (e) of sub-section (1), the railway servant shall forfeit a sum not exceeding one month's pay, which sum may be deducted by the railway administration from his pay.

(3) A rule made under this section shall not take effect until it has received the sanction of the Governor-General in Council, and been published in the *Gazette of India*.

Provided that, where the rule is in the terms of a rule which has already been published at length in the *Gazette of India*, a notification in that Gazette, referring to the rule already published, and announcing the adoption thereof, shall be deemed a publication of a rule in the *Gazette of India* within the meaning of this sub-section.

(4) The Governor-General in Council may cancel any rule made under this section, and the authority required by sub-section (1) to make rules thereunder may at any time, with the previous sanction of the Governor-General in Council, rescind or vary any such rule.

(5) Every rule purporting to have been made for any railway under section 8 of the Indian Railway Act, 1879, (IV of 1879), and appearing from the *Gazette of India* to be intended to apply to the railway at the commencement of this Act, shall, notwithstanding any irregularity in the making or publication of the rule, be deemed to have been made and to have taken effect under this section.

(6) Every railway administration shall keep at each station on its railway a copy of the general rules for the time being in force under this section on the railway, and shall allow any person to inspect it free of charge at all reasonable times.

Old Acts.

Act IV of 1879. S. 8 corresponds to Sub-sections (1) (a), (b), (c), (e), and (g), (2), (3) and (4) of the present Act.

„ XVIII of 1854. S. 26 corresponds to Sub-section (1) (a), (b), (c), (e), and (g), (2) (3) and (4) of the present Act.

Sub-sections (1) (d) and (f), proviso to Sub-section (3), (5) and (6) are new.
Proviso to Sub-section (3) represents the existing practice.

(Notes).

General.

(1) Analogous provision.

(a) SUB SECTION (1) (a to f)

Cf. Ss 7 to 9, the Railways Regulation Act, 1840 (3 and 4 Vic. c. 87), and S. 10, the Railways Clauses Act, 1845 (8 and 9 Vic. c. 20). Q

(b) SUB SECTION (1) (c)

Cf. S. 32, the Railway Clauses Act, 1863 (26 and 27 Vic. c. 92). R

(c) SUB-SECTION (2).

Cf. The words ' and that ' down to the end of the Sub-section with S. 86, the Canadian Railways Act, 1836 (49 Vic. c. 109). S

(2) Section, scope and nature of.

(a) This section will remove any doubt as to the validity of any existing rules and provides that, when rules have once been published in the Gazette of India, they may be extended to a railway by a reference to that Gazette and an announcement of their adoption for the railway, without being again published at length in the Gazette. (See Statement of Objects and Reasons). T

(b) The intention of the section is to give the Railway Company power to enforce rules of its own making by imposing fine on its own servants. 11 C. W. N. 583 (584)=5 Cr. L. J. 463. U

(c) It seems that the Legislature, in enacting Ss. 26, 29, Act XVIII of 1854 (Cf. S. 47 and 101, present Act), had chiefly in view the protection of the public, and especially of passengers and other persons not directly connected with the railway, and it is very doubtful whether it was the intention of the Act to make the officers responsible for risks to fellow servants arising out of the particular duty in which they are engaged. 8 W. R. 43 (Cr.) V

(3) Distinction.

(a) By S. 47, the Railway Company may make general rules for regulating the terms on which it will warehouse or retain goods at any station. 81 C. 951 (958)=8 C. W. N. 725. W

(b) By S. 54, the Railway Company may impose conditions for receiving goods (*Ibid.*) X

1.—“*Shall make general rules.*”

(1) General rules for working of railways under construction.

For—, see *General Statutory Rules and Orders*, Vol. III.

Y

(2) Ss. 47 and 54—Rules passed under the Act—Reasonableness.

(a) Ss. 47 and 54 of the Act empower the Railway Company to make rules determining the conditions under which the liability (as carriers) shall vest, and, particularly at what point of time it shall vest. 31 C. 951 = 8 C.W.N. 725. Z

(b) But such rules must be consistent with the Act, i.e., reasonable; otherwise they will be void and inoperative. (*Ibid*) A

(c) In Calcutta, a covenant, whereby goods consigned to a Railway Company were to stand at the owner's risk until a receipt had been granted by the Company, was held unreasonable, and the Company was declared liable to pay compensation for loss incurred in the meantime. (*Ibid*.) B

2.—“*For regulating the mode ... propelled.*”

(1) Necessity to take line clear ticket—General rule.

By a General rule sanctioned and notified as required by law, the guard and driver of a ballast train should, on a line worked on the block system, stop the train at a station and should not leave the station till the guard has received from the station master and delivered to the driver a “line clear” certificate. 6 M. 201. C

(2) Charge of disobeying a rule.

Whereas is brought, it is no answer to say that the rule had been habitually broken, or that the obedience to the rule would possibly not have prevented the accident which occurred. 6 M. 201. D

(3) Railway accidents—Duty of Guard

Where some coolies were employed in assisting a ballast train into motion at a Railway station, and one of them, after pushing the train, in getting up on the train, or in attempting to do so, fell and was so injured that he afterwards lost his life, *held*, that the evidence did not show that it was the duty of the Guard to see that no one got up on the train when in motion. 8 W.R. 43 (Cl.) E

3.—“*For regulating the conduct of railway servants.*”

Rules for guidance of railway officials.

For—employed on lines administered by the Government, see, *General Statutory Rules and Orders*, Vol. III. E1

4.—“*For regulating the ... owner.*”

RULES FOR WARE HOUSING AND RETENTION OF GOODS UNDER S. 47 (1) (f).

I.—WHARFAGE.

ON GOODS FOR DESPATCH WAITING TO BE CONSIGNED.

(1) For goods of every description brought on to railway premises for despatch but not consigned, wharfage may be charged at a rate not exceeding one anna per maund or part of a maund per day or part of a day, if consignment notes are not received before closing time of the day on which such goods are brought to the station. E2

4.—“For regulating the...owner”.—(Continued).

RULES FOR WAREHOUSING AND RETENTION OF
GOODS UNDER S. 47 (1) (f).—(Continued).•

I —WHARFAGE (Concluded). •

- (2) Goods will, in all cases, be at owner's risk, until taken over by the railway administration for despatch and a receipt in the prescribed form has been granted duly signed by an authorised railway servant. **F**

ON GOODS AVAILABLE FOR DELIVERY

- (3) (1) A wharfage charge may be levied in respect of all goods not removed from railway premises before closing time of the day following that on which they are made available for delivery. **G**
- (2) The charge referred to in sub-rule (1) shall not exceed, per day or part of a day, one anna per maund or part of a maund, calculated—
- (a) where freight is levied on weight upon such weight ; and
- (b) where freight is levied on the vehicle in or on which the goods are carried, upon the carrying capacity of such vehicle. **H**
- (3) The goods shall be warehoused either under cover or in the open as space may be available. **I**

ON LUGGAGE AND PARCELS AVAILABLE FOR DELIVERY.

- (4) For unclaimed booked luggage and parcels, a wharfage charge not exceeding two annas per maund or part of a maund per 24 hours or part of 24 hours, with a minimum charge as for one maund, may be made if they are not removed from railway premises within 48 hours from midnight of the day of arrival. **J**

NOTICE OF ARRIVAL.

- (5) Subject to the provisions of S. 56 of the Indian Railways Act, 1890 (IX of 1890), notice of arrival will be sent when practicable, but the railway administration will accept no responsibility for non-receipt thereof. **K**

II.—DEMURRAGE.

ON VEHICLES ORDERED AND WAITING TO BE LOADED BY SENDERS.

- (6) Demurrage at a rate not exceeding one anna per ton or part of a ton of carrying capacity per hour or part of an hour, may be charged on all vehicles ordered and not loaded, or loaded and not made available for despatch, after the expiry of nine hours of daylight from the time at which they are placed in position for the purpose. **L**

ON LOADED VEHICLES WAITING TO BE DISCHARGED BY CONSIGNEES.

- (7) Demurrage at a rate not exceeding one anna per ton or part of a ton of carrying capacity per hour or part of an hour, may be charged on all loaded vehicles requiring to be discharged by owners, which are not discharged after the expiry of nine hours of daylight from the time of being placed in position for unloading. The railway administration may, at its option, unload the vehicle, and charge the consignee for doing so and charge wharfage on the contents under rule 3. **M**

4.—“For regulating the....owner”—(Continued).

RULES FOR WAREHOUSING AND RETENTION OF
GOODS UNDER S. 47 (1) (f)—(Continued).

III.—CALCULATION OF CHARGES.

- (8) In calculating wharfage and demurrage charges, fractions of one anna less than six pies shall be dropped, and six pies and over shall be charged as one anna. Where the total amount of demurrage or wharfage due on any consignment is less than two annas, it shall be foregone. N

IV.—GENERAL

- (9) In the event of goods requiring to be loaded or unloaded by owners becoming liable to both demurrage and wharfage charges, the railway administration may levy both demurrage and wharfage charges for such periods as the goods would be liable to such charges under these rules. O
- (10) If, and for so long as the state of the traffic or any sudden emergency makes it necessary, and after advertisement in the local newspapers, the rate of demurrage or wharfage may be increased and the free-time curtailed. P
- (11) The railway administration shall have the same lien on goods for demurrage, wharfage, and, if incurred for unloading as for freight, and these charges must, unless under special arrangements a running account is kept, be paid before the goods are removed. Q
- (12) Where the free time allowed in the previous rules includes either Sunday, Christmas Day or Good Friday, such days shall be allowed free in addition. R

V.—TREATMENT AND DISPOSAL OF UNCLAIMED GOODS, LUGGAGE AND
PARCELS, AND OF LOST PROPERTY FOUND IN RAILWAY VEHICLES
OR ON RAILWAY PREMISES.

- (13) Subject to the exception mentioned in rule 18 below, unclaimed goods shall be kept on hand at the station to which invoiced, for a period of not less than one month, during which time the notice prescribed in S. 56, sub-section (f), of the Indian Railways Act, 1890 (IX of 1890), will, if possible, be served upon the person appearing entitled thereto. S
- (14) If not taken delivery of within a period not less than one month after receipt at the station to which invoiced, unclaimed goods may be sent to the “unclaimed goods or lost property office,” and dealt with as laid down in rule 21 below. T
- (15) Unclaimed articles shall be liable to the wharfage and demurrage charges hereinbefore referred to, as well as to all freight and special expenditure incurred by the railway administration on account of their custody and disposal. U
- (16) After being on hand for one month, unclaimed booked luggage and parcels may be transferred to the “lost property office,” and dealt with in the manner prescribed in rules 15, 17, 18, 21 and 22. Y

4.—“For regulating the....owner—(Continued).

RULES FOR WAREHOUSING AND RETENTION OF
GOODS UNDER S. 47 (1) (f)—(Continued).V.—TREATMENT AND DISPOSAL OF UNCLAIMED GOODS, LUGGAGE AND
PARCELS, AND OF LOST PROPERTY FOUND IN RAILWAY VEHICLES
OR ON RAILWAY PREMISES—(Concluded)

- (17) Where articles such as arms, ammunition, explosives, intoxicating liquors, opium and its preparations, and hemp drugs, the sale of which by unlicensed persons is prohibited by law, are left unclaimed in the possession of the railway administration, they will be made over to the police or excise authorities for disposal under the laws affecting the article. When not of a dangerous, perishable or offensive character, they will, however, be retained in the possession of the railway administration for the same period as that prescribed for other unclaimed articles.

This rule, in so far as it relates to explosives, is supplemental to, and not in modification of, rule 6 (IV) of the rules made under the Indian Explosives Act, 1884 (IV of 1884), and published under the Government of India, Home Department, Notification No 5528, dated 11th October, 1901, in Part I of the *Gazette of India* of the 12th October, 1901 (*vide* Appendix B to Part II of the General Rules for open lines of railway in British India, promulgated with the Government of India Public Works Department, circular No. 6 Railway, dated the 12th March, 1895, as revised by the Government of India, Public Works Department, circular No. 2 Railway, dated the 16th January, 1902), and any modifications of the same which may hereafter be made.

W

- (18) Unclaimed perishable articles may be disposed of by the station master of the station at which they may be left after the expiry of 24 hours or earlier, if they are, or are likely to become, offensive.

X

- (19) Lost property found in railway vehicles, or on railway premises may, subject to the exception mentioned in rule 18, be sent to the nearest “lost property office,” and be similarly dealt with.

Y

- (20) An account of all unclaimed luggage, and of any lost property found on the line or on railway premises, shall be kept by the station master.

Z

- (21) Public sales by auction shall be held from time to time of all unclaimed or lost property which has remained in the possession of the railway administration for over six months. At least fifteen days’ previous notice of each auction shall be given by advertisement in a newspaper.

A

- (22) Any surplus proceeds arising out of sales of lost property or unclaimed consignments will, after payment of all charges and expenses due to the railway administration, be paid to the person or persons thereto entitled.

B

4.—“*For regulating the....owner*”—(Concluded).RULES FOR WAREHOUSING AND RETENTION OF
GOODS UNDER S. 47 (1) (f)—(Concluded).

VI.—CLOAK-ROOMS.

- (23) Passengers may leave small parcels or packages in the cloak-rooms, at such stations as may be specified from time to time by the railway administration. **C**
- (24) A charge of two annas per maund or part of a maund with a minimum charge per package as for one maund, may be levied for each 24 hours or part of 24 hours during which the parcel or package remains in a cloak-room. **D**
- (25) The responsibility of the railway administration for articles left in a cloak-room, shall be that of a bailee under sections 151, 152 and 161 of the Indian Contract Act, 1872 (IX of 1872). **E**
- (26) A receipt ticket shall be given to any person depositing parcels and packages for custody in a cloak-room, and delivery will be made to any person presenting such receipt ticket, after which all responsibility of the railway administration in respect of such parcels or packages shall absolutely cease and determine. **F**
- (27) Articles deposited in cloak-rooms which are unclaimed may, after a period of one month, be transferred to the “lost property office,” and dealt with as prescribed in rules 15, 17, 18, 21 and 22 for unclaimed consignments. **G**

N.B.—The above rules were sanctioned by Government of India Notification No. 231, dated 3rd July, 1902.

(1) **Responsibility of Railway Company for goods left on its premises without receipt being obtained for them—Company rules.**

A rule by which a Railway Company disclaimed all responsibility for goods left on the Company's premises, unless certain conditions were fulfilled, the principal of which was that the goods should have been accepted and a receipt given for them by a duly authorised employee of the Company, was a rule properly made under the provisions of this Act, and no suit in respect of the loss of goods merely deposited on the Company's premises without such a receipt being taken for them, could be maintained. 23 A. 367 = A W.N. (1901), 107 (*Shea v. The Great Northern Ry Co*, 14 C B. 647, R.). **H**

(2) **Railway Company, when can claim wharfage and demurrage.**

Where the goods remained on the premises of the plaintiff company, not by reason of any neglect or default of their owner to take delivery of them, but by the act of the plaintiffs themselves, who kept and refused to deliver them for their own protection and benefit, all that the company could possibly be entitled to, would be a reasonable warehouse rent, and not any wharfage or demurrage, which latter could be claimed only when the owners had failed to take delivery of the goods within a certain time after notice of arrival. 18 B. 231 (236). **I**

5.—“For regulating the travelling upon . . . railway.”

(1) General rules made by the Director-General of Railways.

For—, for all open lines of railway in British India administered by the Government, *see*, General Statutory Rules and Orders, Vol. III. **J**

(2) Railway ticket, available only on day of issue.

(a) One of the rules made by a Railway Company under S. 47 is that tickets are only available on the day of issue. 1 Weir 870 **K**

(b) Therefore, a ticket not so availed of is not a proper ticket within the meaning of S. 68 of the Act. (*Ibid.*) **L**

6.—“Sub-section (2).”

(1) Rule 29, in Ch. V, pt. II

— of rules made under S. 47, assuming it within the powers conferred by S. 47 (1) (b), while empowering the railway administration, to exclude certain persons not *bona fide* passengers from railway premises, does not render the entry of such persons unlawful under S. 47 (2). 1 S. L. R. 91. **M**

(2) Criminal offences, if created.

Neither S. 47, nor the rules made under that section, create any criminal offence. 11 C.W.N. 583 (594) = 5 Cr. L.J. 463. **N**

(3) Misconduct of railway servants—Fines

Various fines are imposed for misconduct on the part of the Railway servants, and those fines are made enforceable by deductions from their pay. This is in accordance with sub-S. (2) of S. 47. **O**

48 Where two or more railway administrations, whose railways have a common terminus or a portion of the same

Disposal of differences between railways regarding conduct of joint traffic.

line of rails in common, or form separate portions of one continued line of railway communication, are not able to agree upon arrangements for conducting at such common terminus, or at the point of junction between them, their joint traffic with safety to the public, the Governor General in Council, upon the application of either or any of the administrations, may decide the matters in dispute between them so far as those matters relate to the safety of the public, and may determine whether the whole or what proportion of the expenses attending on such arrangements shall be borne by either or any of the administrations respectively.

Old Acts.

Act IV of 1879
Act XVIII of 1854

} No corresponding provision.

(Notes).

(1) Analogous provision.

Cf. S. 11, the Railway Regulation Act, 1842 (5 and 6 Vic. C. 55); and S. 9, the Railways Clauses Act, 1863 (26 and 27 Vic. C. 92). **P**

(2) Section, nature of.

This section provides for the settlement by the Governor-General in Council of differences between railway administrations respecting the use of any common terminus or line of rails, where the differences are such as to be likely to affect the safety of the public. (See *Statement of Objects and Reasons*). Q

49. Any railway company, not being a company for which the Statute 42 and 43 Victoria, chapter 41, provides 1,

Agreements with
the Governor-
General in Council
for construction or
lease of rolling-stock

may, from time to time, make and carry into effect agreements with the Governor-General in Council for the construction of rolling-stock, plant, or machinery used on, or in connection with, railways, or for leasing or taking on lease any rolling-stock, plant, machinery, of equipments required for use on a railway, or for the maintenance of rolling-stock.

Old Acts.

Act IV of 1879
Act XVIII of 1854

} No corresponding provision.

(Notes).

(1) Analogous provision.

Cf. S. 4 (d), the Indian Guaranteed Railways Act, 1879 (42 and 43 Vic. c. 41). R

(2) Ss. 49, 50 and 51, effect of.

The effect of Ss. 49, 50 and 51 will be to confer on railway companies domiciled in India, the same privileges as are enjoyed by the Indian railway companies domiciled in the United Kingdom. (See *Statement of Objects and Reasons*). S

I.—“For which Statute 42 and 43 Vic., C. 41, provides.”

(1) “Guaranteed Company.”

The term—means any of the companies specified in the schedule to the Indian Guaranteed Railways Act, 1879 (42 and 43 Vic. C. 41), and any railway which for the time being constructs, maintains or works a railway under any guarantee from, or arrangement with the Secretary of State for India in Council. (See S. 1, 42 and 43 Vic., c. 41.) T

(2) Railway Companies to which 42 and 43 Vict., C. 41 applies.

The—are

- The Great Indian Peninsular Railway Company ;
- The Madras Railway Company (now M. S. M. R.) ;
- The Bombay Baroda and Central India Railway Company ;
- The Scinde, Punjab and Delhi Railway Company ;
- The Eastern Bengal Railway Company ;
- The South Indian Railway Company ;
- The Oudh and Rohilkhand Railway Company (Limited).

50. Any railway company, not being a company for which the Statute 42 and 43 Victoria, chapter 41, provides may, from time to time, make with the Governor-General in Council, and carry into effect, or, with the sanction of the Governor-General in Council¹, make with any other railway administration, and carry into effect, any agreement² with respect to any of the following purposes, namely :—

Powers of railway companies to enter into working agreements.

- (a) the working, use, management, and maintenance of any railway ;
- (b) the supply of rolling-stock and machinery necessary for any of the purposes mentioned in clause (a), and of officers and servants for the conduct of the traffic of the railway ;
- (c) the payments to be made and the conditions to be performed with respect to such working, use, management, and maintenance ;
- (d) the interchange, accommodation, and conveyance of traffic being on, coming from, or intended for, the respective railways of the contracting parties, and the fixing, collecting, apportionment, and appropriation of the revenues arising from that traffic ;
- (e) generally, the giving effect to any such provisions or stipulations with respect to any of the purposes hereinbefore in this section mentioned as the contracting parties may think fit and mutually agree on .

Provided that the agreement shall not affect any of the rates which the railway administrations, parties thereto, are from time to time respectively authorized to demand and receive from any person; and that every person shall, notwithstanding the agreement, be entitled to the use and benefit of the railways of any railway administrations, parties to the agreement, on the same terms and conditions, and on payment of the same rates, as he would be if the agreement had not been entered into.

Old Acts.

Act IV of 1879	} No corresponding provision.
Act XVIII of 1854	

(Notes).

(1) Analogous provision.

Cf. S. 2, the Indian Guaranteed Railways Act, 1879 (42 and 43 Vic. C. 41).
S. 87, the Railways Clauses Act, 1845 (9 and 9 Vic., C. 20). The Railways
(Sales and Leases) Act, 1845 (8 and 9 Vic., C. 96). S. 22, the Railway
Clauses Act, 1863 (26 and 27 Vic., C. 92). Y

(2) Ss. 49, 50, 51, effect of.

See S. 49, *supra*. W

1.—“With the sanction of the Governor-General in Council”

Delegation of power of Governor-General in Council.

The powers of the Governor-General in Council have been delegated to the
Railway Board, subject to their being exercised in accordance with the
general rules and orders on the subject issued by the Government of
India. (*See Gazette of India, 1907, Pt. I, p. 273*). X

2.—“Agreement.”

Instances.

For—of such agreement, see *Mad. Rules and Orders, Vol. I.* Y

51. Any railway company, not being a company for which the
Statute 42 and 43 Victoria, chapter 41, provides,
may, from time to time, exercise, with the sanc-
tion of the Governor-General in Council, all or
any of the following powers, namely :—

Establishment of
ferries and roadways,
for accommodation
of traffic.

- (a) it may establish, for the accommodation of the traffic of its railway, any ferry equipped with machinery and plant of good quality and adequate in quantity to work the ferry ;
- (b) it may work, for purposes other than the accommodation of the traffic of the railway, any ferry established by it under this section ;
- (c) it may provide and maintain on any of its bridges, roadways for footpassengers, cattle, carriages, carts, or other traffic ;
- (d) it may construct and maintain roads for the accommodation of traffic passing to or from its railway ;
- (e) it may provide and maintain any means of transport which may be required for the reasonable convenience of passengers, animals, or goods carried or to be carried on its railway ;

- (f) it may charge tolls on the traffic using such ferries, roadways, roads, or means of transport as it may provide under this section, according to tariffs to be arranged from time to time with the sanction of the Governor-General in Council.

Old Acts.

Act IV of 1879	}	No corresponding provision.
Act XVIII of 1854		

(Notes).

(1) Analogous provision.

Cf.—S. 4, the Indian Guaranteed Railways Act, 1879 (42 and 43 Vic. c. 41). **Z**

(2) Ss. 49, 50, 51, Effect of.

See S. 49, *supra*.

52. Every railway administration shall, in forms to be prescribed by the Governor-General in Council, prepare, half yearly or at such intervals as the Governor-General in Council may prescribe, such returns of its capital and revenue transactions, and of its traffic, as the Governor-General in Council may require, and shall forward a copy of such returns to the Governor-General in Council at such times as he may direct.

Old Acts.

Act IV of 1879	}	No corresponding provision.
Act XVIII of 1854		

(Note).

Analogous provision.—

Cf.—S. 3, The Railway Regulation Act, 1840 (3 and 4 Vic. c. 97).

Ss. 3 and 4, the Regulation Railways Act, 1868 (31 and 32 Vic. c. 119).

Ss. 9 and 10, the Regulation of Railways Act, 1871 (34 and 35, Vic. c. 78.) **A**

Carriage of Property.

53. (1) Every railway administration shall determine the maximum load for every wagon or truck in its possession, and shall exhibit the words or figures representing the load so determined in a conspicuous manner on the outside of every such wagon or truck.

Maximum load
for wagons.

(2) Every person owning a wagon or truck which passes over a railway shall similarly determine and exhibit the maximum load for the wagon or truck.

(3) The gross weight of any such wagon or truck bearing on the axles when the wagon or truck is loaded to such maximum load shall not exceed such limit as may be fixed by the Governor-General in Council for the class of axle under the wagon or truck.

Old Act.

This section is new.

(Note).**Analogous provision.***Cf.*—S. 16, the Railway Regulation Act, 1842 (5 and 6 Vic. c. 55.)**B**

- 54.** (1)¹ Subject to the control of the Governor-General in Council, a railway administration may impose conditions, not inconsistent with this Act, or with any general rule thereunder, with respect to the receiving, forwarding, or delivering of any animals or goods.

Power for railway administrations to impose conditions for working traffic.

(2) The railway administration shall keep at each station on its railway a copy of the conditions for the time being in force under sub-section (1) at the station, and shall allow any person to inspect it free of charge at all reasonable times.

(3) A railway administration shall not be bound to carry any animal suffering from any infectious or contagious disorder.

Old Act.

This section is new.

(Notes).**General.****(1) Section, necessity for.**

A clause like this (S. 54) is considered necessary for the purpose of covering the condition which all railway administrations in India do in fact impose in their quarterly hand books of fares and rates, published for the information of the public. (See *Statement of Objects and Reasons*). **C**

(2) Ss. 47 and 54—Distinction.

See 31 C. 951=8 C.W.N. 725, noted under S. 47, *supra*.

D**1.—“ Sub-S. (1).”****(1) Various forms sanctioned under Sub-S. (1).**

- (a) Goods consignment note.
- (b) Goods receipt note.
- (c) Luggage ticket.
- (d) Parcels by bill.
- (e) Single ticket for horses, carriages, dogs, etc.
- (f) Return ticket for horses, carriages, dogs, etc.
- (g) Live-stock ticket.

(2) Bye-laws, nature of.

Bye-laws can be passed only under S. 54 (1) of the Act, which only authorizes the passing of rules consistent with the Act, with respect to the “receiving, forwarding, or delivering” of articles. 76 P. R. 1908=139 P.W.R. 1907.

F

1.—Sub-S. (1)''—(Concluded).

(3) Rule framed under the Act—Reasonableness.

(a) No rule or bye-law made by any Railway Company which is inconsistent with, or not authorised by any of the provisions of this Act, even if sanctioned by the Governor-General, is valid. 76 P.R. 1908=199 P.W.R. 1908. **G**

(b) Under S. 54 (1) of the Act, the conditions that may be imposed by a bye-law are conditions with respect to the "receiving, forwarding or delivering" of articles. It cannot be said that a bye-law prescribing what the consignor or consignee is to do after the goods are lost, comes within these words. (*Ibid.*) **H**

(4) Ss 47 and 54—Rules passed under the Act—Reasonableness.

See 31 C. 951=8 C.W.N. 725, noted under S. 47, *supra*. **I**

(5) Rule framed by Railway.

A rule by which the railway administration disclaims responsibility for goods left on their premises unless certain conditions are fulfilled, one of which is that the goods should have been actually booked and a receipt given for them by a duly authorised agent or clerk, is a rule neither unnatural nor contrary to the General Law of Contracts. (1 S L R. 77.) **J**

55. (1) If a person fails to pay, on demand made by or on behalf of a railway administration, any rate, terminal, or other charge due from him in respect of any animals or goods ¹, the railway administration may detain ², the whole or any of the animals or goods, or, if they have been removed from the railway, any other animals or goods of such person then being in, or thereafter coming into, its possession.

¹ Lien for rates, terminals and other charges.

(2) When any animals or goods have been detained under subsection (1), the railway administration may sell ³, by public auction, in the case of perishable goods, at once, and, in the case of other goods or of animals, on the expiration of at least fifteen days' notice of the intended auction published in one or more of the local newspapers, or, where there are no such newspapers, in such manner as the Governor-General in Council may prescribe ⁴ sufficient of such animals or goods to produce a sum equal to the charge; and all expenses of such detention, notice and sale, including, in the case of animals, the expenses of the feeding, watering, and tending thereof.

(3) Out of the proceeds of the sale, the railway administration may retain a sum equal to the charge and the expenses aforesaid, rendering the surplus, if any, of the proceeds, and such of the animals or goods (if any) as remain unsold, to the person entitled thereto.

(4) If a person, on whom a demand for any rate, terminal, or other charge due from him has been made, fails to remove from the railway, within a reasonable time, any animals or goods which have been detained under sub-section (1), or any animals or goods which have remained unsold after a sale under sub-section (2), the railway administration may sell the whole of them, and dispose of the proceeds of the sale, as nearly as may be, under the provisions of sub-section (3).

(5) Notwithstanding anything in the foregoing sub-sections, the railway administration may recover by suit any such rate, terminal, or other charge as aforesaid or balance thereof.

Old Acts.

Act IV of 1879—*Uf.*—S. 14, with sub-sections (1) (2) (3) and (5) of the present Act.

Act XVIII of 1854—*Cf.*—S. 12, with sub-section (1) (2) (3) and (5) of the present Act.

Sub-section (4) is new

(Notes).

Analogous provision.

Cf.—S. 97, the Railway Clauses Act, 1845 (8 and 9 Vic. c. 20).

K

1.—“If a person fails . . . goods.”

Railway Company putting a horse at the end of a journey into a livery stable.

A—for its protection, will doubtless be entitled to recover the charges from the consignee for so doing (*G. N. Ry. Co. v. Swaffield*, 43 L.J. Ex. 89. L

2.—“The Railway administration may detain.”

(1) The way in which Railway Company ought to deal with goods under lien.

(a) If a railway company keeps goods for its lien, it ought to deal with them reasonably. See *G. W. Ry. Co. v. Crouch*, 27 L.J. Ex. 345. M

(b) Where the consignee fails to pay for the carriage of the goods consigned at the place of destination, the railway company ought not to send them back at once to the station wherefrom they were despatched. (*Ibid.*) N

(2) Prior debt due by consignee—Right to detain.

By virtue of the powers conferred on a Railway Company by S. 55 of the Act, they can detain goods for prior debts due to them by the owner. (N. W.P. High Court, July 11, 1905). O

(3) Lien of carriers—Stoppage in transit.

(a) The right of a consignor to stop the goods in transit is not affected by a usage for carriers to retain goods as a lien for a general balance of account between them and the consignee. *Oppenheim v. Russell*. 8 B. and P. 42. P

(b) Likewise, where the lien for freight is only as regards the goods, the subject of stoppage in transit. *Crawshay v. Elades*, 1 B. and C. 181. Q

2.—“The railway administration may detain” —(Concluded).

(c) The lien of the carrier, as against the consignee, only enables him, to be paid for the carriage of the particular goods. *Oppenheim v. Russell*, 3 B and P. 42. **R**

(d) But, by the lien, the consignor's right to stop the goods in transit is not defeated. (*Ibid.*) **S**

(e) It is evident that in India a railway administration will apparently have a general lien for any rate, terminal or other charge. (See the section) **T**
N.B.—For further cases, see notes under S 57, *infra*.

3.—“Sell.”

(1) Railway Company's duty to sell detained goods—Notice of particulars of liability.

Sub-S. (2) of this section does not impose any liability or duty on the Railway Company to sell. It merely empowers them to do so. They ought to inform the owner distinctly in time that his goods are detained owing to a debt due to the company giving full particulars (*Ibid.*) **U**

(2) Demand, nature of—Demand condition precedent to right to sell.

(a) A demand ought to be for a distinctly specified amount. See *Held v Newport, etc., Ry. Co*, 3 H. and N 409. **Y**

(b) The demand of the amount actually due for tolls is a condition precedent to the right to sell. (*Ibid*) **W**

4 —“Published in one of . . . prescribe.”

Mode of publishing notices—Absence of Local Newspapers—Bombay.

For mode of publishing notice of auction-sales in places where there are no local newspapers in Bombay, See *Bom. Govt. Gazette*, 1895, Pt. I, p 1320. **X**

56. (1) When any animals or goods have come into the possession of a railway administration for carriage or otherwise, and are not claimed by the owner or other person appearing to the railway administration to be entitled thereto, the railway administration shall, if such owner or person is known, cause a notice to be served upon him requiring him to remove the animals or goods.

Disposal of unclaimed things on a railway.

(2) If such owner or person is not known, or the notice cannot be served upon him, or he does not comply with the requisition in the notice, the railway administration may, within a reasonable time, subject to the provisions of any other enactment for the time being in force, sell the animals or goods, as nearly as may be, under the provisions of the last foregoing section, rendering the surplus, if any, of the proceeds of the sale to any person entitled thereto.

Old Act.

This section is new.

(Note).**1.—“Disposal of unclaimed things on a railway.”****Rules for the disposal of unclaimed goods.**

See notes under S. 47 (1) (f), *supra*.

Y

57. Where any animals, goods, or sale-proceeds in the possession of a railway administration are claimed by two or more persons, or the ticket or receipt given for the animals or goods is not forthcoming, the railway administration may withhold delivery of the animals, goods, or sale-proceeds until the person entitled in its opinion to receive them has given an indemnity, to the satisfaction of the railway administration, against the claims of any other person with respect to the animals, goods, or sale-proceeds.

Power for railway administrations to require indemnity on delivery of goods in certain cases 1

Old Act

This section is new.

(Notes).**Section, history of.**

- (a) This section was suggested by the Secretary of State's Despatch, Railway, No. 4, dated the 5th Jan. 1888. Z
- (b) “These sections (Ss. 58 and 59, of the Indian Railway Bill, the former being omitted and the latter corresponding to S. 57 of the present Act) have been suggested partly by existing practice, partly by the case of *Eagleton v. The East Indian Railway Co*, 8 B.L.R. 581, and partly by the proposal to give railway receipts the same effect as bills of lading. The proposal to give such effect to railway receipts has not been adopted, because railway administrations are understood to be averse to it, and it is not justified by existing legislation elsewhere.” (See the *Statement of Objects and Reasons*, dated the 22nd Oct. 1888.) A

1.—“Power of railway administrations ...cases”**(1) Railway receipt—Carrier—*Jus tertii*.**

Where a person accepts bills of exchange on the security of a railway receipt, on which the Railway Company has promised to act, the possession of the goods has passed to that person, and the authority given to him to receive the goods cannot be revoked. 8 B.L.R. 581. B

{2) Necessity for stating the law on the right of stoppage *in transitu*.

Cases wherein two or more persons claim goods, etc., in the possession of a Railway Company very often crop up if the consignors are not paid and the consignees having become insolvent, the consignors stop the goods in transit in the hands of the Railway Company. C

1.—“Power of railway administrations....cases”—(Continued).

I.—STOPPAGE IN TRANSIT, SUMMARY OF THE LAW ON THE SUBJECT OF.

A.—CONDITIONS FOR THE VESTING OF THE RIGHT (SS. 99 AND 100 CONTRACT ACT).

(i) Power of seller to stop in transit

(1) Three essentials.

Three things must concur in order that the right of stoppage may vest in a seller —

- (a) There must be an unpaid seller, who
- (b) has parted with the possession of the goods, and
- (c) the buyer has become insolvent

Under the above circumstances, the seller has the right to resume possession of the goods and to retain them, until the whole of the price of the goods is paid. (See S. 99, Contract Act) **D**

(2) Acceptance of negotiable security as payment

A seller, who takes a negotiable security as an absolute payment, is not an unpaid seller and cannot exercise the right of stoppage in transit. 3 M.I.A. 422. **E**

(3) Property not passed—Seller's right

When the property has not passed, the seller's rights depend on his right of lien, or upon a reservation of the *jus disponendi*. *Bolton v Lancashire and Yorkshire Ry Co*, L. R. 1 C. P. 491 (1891). **F**

(4) Kind of goods which may be stopped

(a) The right of the seller to stop in transit is exercisable only against the goods themselves, or their net proceeds of sale. *Kemp v Falk*, L. R. 7 App. Cas. 572. **G**

(b) Such a right cannot be exercised against policy moneys paid in respect of insurances effected by the vendee. *Berndson v. Strang*, L. R. 3 Ch. 588 **H**

(ii) When goods are to be deemed in transit.

(1) Goods are deemed to be in transit.

—while they are in the possession of the carrier or lodged at any place in the course of transmission to the buyer, and are not yet come into the possession of the buyer or any person on his behalf, otherwise than as being in possession of the carrier, or as being so lodged. (S. 100, Indian Contract Act, IX of 1872.) **I**

(2) Goods are in transit.

(a),—although they may have left the hands of the person to whom the seller entrusted them for transmission. *Bethell v. Clark*, L. R. 20 Q. B. D. 615 (619). **J**

(b) It is immaterial how many agents' hands they may have passed through, if they have not reached their destination. (*Ibid*) **K**

1.—“Power of railway administrations....cases”—(Continued).

**I.—STOPPAGE IN TRANSIT, SUMMARY OF THE LAW
ON THE SUBJECT OF—(Continued).**

**A.—CONDITIONS FOR THE VESTING OF THE RIGHT (Ss 99 AND 100,
CONTRACT ACT) —(Continued).**

(ii) When goods are to be deemed in transit—(Continued).

(3) Right to stop, when ceases.

- (a) The right to stop ceases if the goods are delivered. See *Kendall v. Marshall, Stevens and Co*, 11 Q B.D. 356. **L**
- (b) Where the freight due to a Railway Company has been paid and the goods have been loaded into the purchaser's carts, the unpaid vendor's right to stop in transit is at an end, and mere fact that the purchaser's carts were still standing in the goods—compound in the railway station, cannot affect the question. 14 B 57 (65). **M**
- (c) So long as the goods are subject to a lien for freight, the transit has not ended. The goods are not at home. The converse proposition would seem also to be true, viz., when the ship-owner lands the goods and his freight has been paid, his right of control and lien over the goods is gone, and thenceforth the goods are held by the wharfingers for the consignee alone. 17 B. 62 (92) **N**
- (d) Where goods are consigned to a carrier to await the orders of the buyer, and it is subsequently agreed between the carrier and the buyer that the former is to hold the goods as a warehouse-keeper for the buyer, the seller's right to stop the goods in transit is at an end. *Taylor v. G. W. Ry.* 1 R. (1901) 1 K B. 774. **O**

(4) Wrongful refusal to deliver

If a carrier wrongfully refuses to deliver possession on demand made and tender of freight by the buyer, the transit is deemed to be at an end. See *Bud v. Brown*, 11 Ex. 786 (790), cited in 14 B 57 (66). **P**

(5) Carrier's lien for freight—“Stoppage” in transit

- (a) “A carrier has a lien on the entire cargo for his whole freight.” Per *Bayley, J.*, in *Cranshaw v. Eades*, 1 B. and C. 181 (184). **Q**
- (b) Until the amount is either tendered or paid, the special property which he has in his character of carrier does not pass out of him to the vendee, unless, indeed, he does some act to show that he assents to the vendee's taking possession of the property before the freight is paid.” (*Ibid*) **R**
- (c) In order to divest the consignor's right to stop in transit, there ought to be such a delivery to the consignee, as to divest the carrier's lien on the whole cargo.” (*Ibid*) **S**
- (d) Where, therefore, the entire freight has not been tendered or paid, the delivery is not complete as to any part; the special property is in the carrier, and the consignor is not deprived of his rights to stop *in transitu*.” (*Ibid*). **T**

1.—“Power of railway administrations ...cases”—(Continued).

I.—STOPPAGE IN TRANSIT, SUMMARY OF THE LAW
ON THE SUBJECT OF—(Continued). •A.—CONDITIONS FOR THE VESTING OF THE RIGHT (Ss. 99 AND 100,
CONTRACT ACT)—(Concluded).

(ii) When goods are to be deemed in transit—(Concluded).

(6) Rejection by buyer.

- Till the buyer obtains absolute or constructive possession of the goods, they are in transit. Where, therefore, on the arrival of the goods, they are rejected by the buyer on account of certain difference in weight and quality, *held*, that the transit was never determined, and that the vendor had the right to stop in transit. *Bolton v. L. Y. Ry. Co.*, L. R. 1 C. P. 431. • U

(7) Payment of freight.

It is not on alone, that the transit is put an end to. 14 B. 57. U 1

(8) Consignment of 181 bags of wheat—73 bags arrived, loaded into carting agent's carts and unloaded - Effect.

Where, on a consignment of 181 bags of wheat whereon freight had been paid, 73 bags which arrived at the destination were loaded into the carting agent's carts and subsequently unloaded, *held*, that the transit of 73 bags had ceased, but not as to the remaining bags. 14 B. 57. Y

(9) Part delivery, if delivery of whole.

The question whether part-delivery of goods amounts to a delivery of the whole depends on the intention of the parties *Kemp v. Folk*, L. R. 7 App. Cas. 573 (586). W

(10) Part-delivery—Effect.

Where part-delivery of the goods has been made to the buyer or his agent, the remainder are still in transit and can be stopped, for, the possession of the remainder is unaffected thereby, unless such part-delivery has been made under such circumstances as to show an agreement to give up the possession of the whole of the goods. *Bolton v. Lancashire and Yorkshire Ry. Co.*, L. R. 1 C. P. 431 X

B—HOW GIVEN EFFECT TO (Ss 104, 105, CONTRACT ACT).

How the right to stop the goods in transit is given effect to.

(a) The goods may be stopped in either of two ways —

- (i) By the seller taking actual possession of the goods.
- (ii) By seller giving notice of his claims. (See S. 104, Indian Contract Act, IX of 1872). X 1

(b) The notice of seller's claim must be given either to,—

- (i) “the person who has the immediate possession of the goods,” as the warehouse-man, or
- (ii) “the principal whose servant has possession,” as the railway administrations. (See S. 105, Contract Act and the *dictum of Parke, B.*, in *Whitehead v. Anderson*, 9 M. and W. 518). W

(c) If the seller gives notice to the (principal railway administration), the notice to be effectual as a stoppage must be given at such a time and under such circumstances, that the principal (railway administration), by the exercise of reasonable diligence, may communicate it to the servants in time to prevent a delivery to the buyer. (Held.) Z

1.—“Power of railway administrations....cases”—(Continued).

I.—STOPPAGE IN TRANSIT, SUMMARY OF THE LAW
ON THE SUBJECT OF—(Continued).

B.—HOW GIVEN EFFECT TO (Ss. 101, 105, CONTRACT ACT)—(Concluded).

(2) Notice to the buyer.

A—cannot affect a stoppage in transit *Phelps v. Combs*, L.R. 19 Ch. Div. 813.
See, also, 17 B 62. **A**

C—DURATION OF THE RIGHT (S. 106, CONTRACT ACT).

(1) Right of seller on stoppage.

Stoppage in transit entitles the seller to hold the goods stopped until the price of the whole of the goods sold is paid. (See S. 105 of the Indian Contract Act, IX of 1872). **B**

Illustration.

A sells to B 100 bales of cotton, 60 bales having come to B's possession, and 40 being still in transit. B becomes insolvent, and A, being still unpaid, stops the 40 bales in transit. A is entitled to hold the 40 bales until the price of the 100 bales is paid. (*Ibid*) **C**

(2) Stoppage in transitu restores lien.

(a) Stoppage in transit does not operate as a rescission of the contract, but merely restores to the seller his lien for price. *Schotsmans v. Lancashire and Yorkshire Ry.*, L.R. 2 Ch. Ap. 310 **D**

(b) The unpaid seller resumes possession of the goods for enforcing his lien. *Phelps v. Combes*, L.R. 29 Ch. Div. 813 (821) **E**

(c) So, he can retain the goods as long as the price remains unpaid. (See Illustration to S. 106, Indian Contract Act, IX of 1872).

D.—CESSATION OF THE RIGHT (Ss. 100 to 103, CONTRACT ACT).

(i) Transit and right of stoppage in transit, lasting till the goods come into the possession of the buyer or of any person on his behalf.

See S. 100, Contract Act, *supra*

G

(ii) Stoppage in transit after resale by the buyer.

Seller's right of stoppage—Re-sale by buyer

(a) The seller's right of stoppage does not, except in the cases hereinafter mentioned, cease on the buyer's re-selling the goods while in transit and receiving the price, but continues until the goods have been delivered to the second buyer or to some person on his behalf. (S. 101, Contract Act) **H**

(b) The right of stoppage in transit consequently exists against the buyer and all persons claiming under him. See *Kemp v. Falk*, L.R. 7 A.C. 573. **I**

(c) Thus it avails against a sub-purchaser from the buyer, even though he has paid the purchase-money to the buyer. (*Ibid*) **J**

(d) For, such a sub-sale passes to the sub-purchaser the buyer's interest in the goods, but subject to the original seller's right of stoppage which is a right against the goods. (*Ibid*) **K**

1.—“Power of railway administrations...cases”—(Continued).

I.—STOPPAGE IN TRANSIT, SUMMARY OF THE LAW ON THE SUBJECT OF—(Continued).

D.—CESSATION OF THE RIGHT (Ss. 100 to 103, CONTRACT ACT)—(Contd).

(iii) Cessation of right on assignment by buyer of bill-of-lading.

Assignment of bill-of-lading, etc.

The right of stoppage ceases if the buyer, having obtained a bill-of-lading or other document showing title to the goods, assigns it, while the goods are in transit, to a second buyer who is acting in good faith, and who gives valuable consideration for them. (S 102, Contract Act. See, also, *illustrations* to that section) **L**

(iv) Stoppage where bill-of-lading is pledged to secure specific advance.

(1) Bill-of lading pledged to secure specific advance—Stoppage of goods in transit.

Where a bill-of-lading or other instrument of title to any goods is assigned by the buyer of such goods by way of pledge, to secure an advance made specifically on it, in good faith, the seller cannot, except on payment of tender to the pledgee of the advance so made, stop the goods in transit. (S 103, Contract Act. See also the *illustrations* to that section). **M**

(2) Railway receipts, whether instruments of title—Endorsement of railway receipts—Effect of.

(a) (i) Railway receipts for goods are not instruments of title, within the meaning of S 103 of the Contract Act, and by endorsing and handing them over to a third person, no assignment within the meaning of S 103 of the Contract Act is made. 14 B 57 (67) **N**

(ii) “If this be thought by the commercial community to be an unsatisfactory state of the law, it will be necessary in our opinion, that the desired change should be made by the Legislature” Per *Sargent, C.J.*, in 14 B, 57 (69). **O**

(b) (i) The railway receipt in 14 B. 57, *supra*, runs thus.—

“Received from the consignor the undermentioned goods for conveyance to B. Bandar station by goods train, consignee C. D., description—18 bags of wheat. This receipt must be produced by the consignee, or the goods will not be delivered, if he does not himself attend, he must endorse a request for delivery to the person to whom he wishes it made. If the consignment or the railway receipt is sold one or more times, the endorsement must be a distinct order to deliver to a certain person or firm, and this order must be on an one-anna stamp. If more than one order appear on the face hereof, each order must bear a stamp. For condition of contract see back—Signature (—)”. 14 B 57 (67). **P**

(ii) In delivering judgment *Sargent, C. J.*, said:—

“There can be no doubt that such a document, if endorsed, would not have been treated in the English Courts as a document or instrument of title to exclude the vendor's right of stoppage in transit, when the Contract Act came into force in 1872.” (*Ibid.*) **Q**

I.—“Power of railway administrations....cases”—(Continued).

I.—STOPPAGE IN TRANSIT, SUMMARY OF THE LAW
ON THE SUBJECT OF—(Concluded.)

D.—CESSATION OF THE RIGHT (Ss. 100 to 103, CONTRACT ACT)—(Concludd.)

(iv) Stoppage where bill of lading is pledged to secure specific advance—(Concluded).

(iii) “The decision of the Exchequer Court in 1846 in *Farna v. Home*, 16 M. and W. 119, was then in force, by which a delivery warrant signed by a wharfinger, whereby the goods were made deliverable to the plaintiff, “or his assignee by endorsement,” was held to be “no more than a token of authority to receive possession” —(Blackburn on Sales, p. 297) or, as Mr. Bason Parker states it, R

“Only an engagement by the wharfinger to deliver to the consignee, or any one he may appoint, and that, until the wharfinger has attorned to the assignee and agreed with him to hold for him, there was no constructive delivery to the assignee.” (*Ibid.*) S

(iv) “That decision was never overruled, and authoritatively determined the legal effect of such documents—at any rate until the passing of the Factors’ Act of 1877 (40 and 41 Vic , c. 39). T

(v) “In *Trikam Punchand v. B B. and C I. Ry Co* (Suit No. 287 of 1886), *Farran, J.* seems to have thought that, in the absence of any definition of a document of title in the Contract Act itself, S. 4, Act XX of 1844 (by which the English Factor’s Act, 5 and 6 Vic , c. 39, was extended to India) might be properly accepted as a guide to the meaning of the expressions “documents showing title to goods” or “instruments of title to goods,” in Ss. 108 and 103 of the Contract Act ; but it appears that, however much that definition might assist in construing the expression “document showing title” in S. 108 of the Contract Act, which was virtually substituted for the Factor’s Act, and is *in pari materia*, it cannot be properly used in construing the expression “instrument of title” in S. 103 which relates to an entirely different subject-matter from the Factor’s Act, and that it is therefore, more reasonable to presume that, in a matter of such general commercial importance, the framers of the Contract Act intended to leave the term “instrument of title” in S. 103 to be construed with reference to the decision then in force in the English Courts.” (*Ibid.*) U

(c) Railway receipts are binding, and operate as estoppels against the railway companies issuing it, either as instrument of title or otherwise. 3 Bom L.R. 260 (267). V

II.—MISCELLANEOUS.

A —Estoppel of railways by issue of railway receipts.

Estoppel of railways by the representations made by them in the issuing of
• “railway receipts”

See in this connection Ss. 115 and 117, Evidence Act. W

B.—Bailment.

(1) Bailment by several joint owners

See S. 165, Contract Act. X

I.—“Power of railway administrations....cases”—(Continued)

II.—MISCELLANEOUS—(Continued).

B.—Bailment—(Concluded).

(2) Bailee not responsible, on re-delivery to bailor without title

See S. 166, Contract Act.

Y

(3) Right of third person claiming goods bailed.

See S. 167, Contract Act.

Z

C.—Interpleader suits

(1) Provisions as to filing interpleader suits.

For—see §. 88 and O. XXXV, Act V of 1908 (Civ. Pro. Code)

A

(2) Interpleader suit—Essentials.

According to O. XXXV, r.1., Civ. Pro. Code, 1908, in every suit of interpleader, it is necessary that the plaintiff claims no interest in the subject-matter in dispute other than for charges or costs. There must be no collusion between the plaintiff and any of the defendants.

B

(3) Claims must be *bona fide*.

An interpleader suit may be instituted where two or more persons claim *bona fide*. *New Hamburg and Brazilian Railway*, W.N. 1875, p. 239

C

(4) Charges—What are.

(a) The charges include a right to wharfage, freight and demurrage by a carrier. 18 B. 231 (235).

D

(b) So, a claim for warehouse-rent is not such an interest as will exclude a plaintiff from filing an interpleader suit. *Harnood v. Betham*, 1 L.J. Ex. 180.

E

(c) Also one for freight and charges made by a Bank with which bullion is deposited. *Colter v. Bank of England*, 2 L.J.C.P. 158.

F

(d) Also one for dock rent and charges. *Attenborough v. St. Katherine's Dock Co.*, (1878) 3 C.P.D., 450.

G

(5) Interest, what is—Effect of claiming an interest.

(a) The person in possession must be in the position of a mere stake-holder claiming no interest himself. *Prudential Assurance Co. v. Thomas* 3 Ch. App. 74.

H

(b) A right of lien is not an interest in the property. *Attenborough v. St. Katherine's Dock Co.*, (1878) 3 C.P.D. 450

I

(c) An interpleader suit will not lie if the plaintiff claims an interest in the property, or disputes the amount, or has paid it to a defendant on an indemnity. *Burnett v. Anderson*, 1 Ma. 405.

J

(d) So, also, where a plaintiff represents not merely that he has a lien with respect to which two other persons have adverse rights, but that there is a further question to be litigated adversely between himself and one of them, that is not a case of interpleader. *Bignold v. Adland*, (1840) 11 Sim 23.

K

(e) Where there had been an agreement by stake-holders to pay a smaller amount in the event of the success of one of the parties to the suit, held, they had an interest in the subject-matter. *Murritta v. South Armenian Co.*, 62 L.J. Q.B. 398.

I.—“Power of railway administrations....cases”—(Concluded).

II.—MISCELLANEOUS—(Concluded).

C.—Interpleader suits—(Concluded).

(6) Plaintiff claiming an interest in suit property.

A—has no right of suit. *Mitchell v. Hayne*, 2 S and S. 63; see 18 B. 231 (235) M

(7) Plaintiff disputing amount of suit property.

Where the plaintiff disputes the amount of suit property, no suit will lie. *Diploch v. Hammond*, 2 Sm. and G 141. N

(8) Plaintiff ought to place suit property in Court's custody.

Where the plaintiffs failed to pay into, or place in the custody of, the Court, the subject matter of the controversy, their claim for wharfage and demurrage was held to be untenable. 18 B 231 (236). O

(9) Duty of person in possession—Payment into Court.

(a) The person in possession must be ready to deliver it to the right owner. *Tanner v European Bank*, L.R 1 Ex. 261. P

(b) Where a person in the position of a mere stake-holder is made a defendant in a suit, his proper course would be to pay the money into Court and pray that the persons really interested may be substituted as defendants in his place. 2 Ind Juris N S. 113 Q

(c) The person against whom the suit is instituted must be in possession. *Burnett v. Anderson*, (1816) 1 Mer 405 R

(d) The stake-holder need not have been sued. *New Hamburg and Brazilian Railway*. W. N., p. 239 (1875) S

(10) Bailee may interplead.

A—, though estopped from pleading a *Jus tertii* *Ex parte Mersey Docks Board*, (1899) 1 Q B 516. T

(11) Collusion, meaning of.

“Collusion,” does not involve anything morally wrong. *Muretta v. South Armenian Co.*, 62 L.J Q B 396 U

(12) Facts from which collusion will be presumed.

(a) It is collusion to take an indemnity from one of the parties. *Tucker v. Morris*, 1 Cr and M 73 V

(b) Where the plaintiff has delivered the subject-matter in dispute to one claimant on an indemnity, no suit will lie. *Burnett v. Anderson*, 1. Mer 405 W

(c) An agreement with the stake-holders, whereby the plaintiffs bound themselves to defeat the right of other claimants to the fund, was held to be collusive. *Muretta v. South Armenian Co.*, 62 L.J.Q B. 396. X

(13) Estoppel to objection as to collusion.

Where the contention was that a stake-holder had, by merely taking an indemnity from one of the rival claimants to property in his hands, deprived himself of the right to relief, as he identified himself and must be taken to “collude” with the claimant that gave the indemnity, held, that the claimant could not raise the objection. *Thompson v. Wright*, 18 Q B D 632 Y

58. (1) The owner or person having charge of any goods which are brought upon a railway for the purpose of being carried thereon, and the consignee of any goods which have been carried on a railway, shall, on the request of any railway servant appointed in this behalf by the railway administration, deliver to such servant an account in writing signed by such owner or person, or by such consignee, as the case may be, and containing such a description of the goods as may be sufficient to determine the rate which the railway administration is entitled to charge in respect thereof.

(2) If such owner, person, or consignee refuses or neglects to give such an account, and refuses to open the parcel or package containing the goods, in order that their description may be ascertained, the railway administration may (a) in respect of goods which have been brought for the purpose of being carried on the railway, refuse to carry the goods, unless in respect thereof a rate is paid not exceeding the highest rate which may be in force at the time on the railway for any class of goods, or (b), in respect of goods which have been carried on the railway, charge a rate not exceeding such highest rate.

(3) If an account delivered under sub-section (1) is materially false with respect to the description of any goods to which it purports to relate, and which have been carried on the railway, the railway administration may charge, in respect of the carriage of the goods, a rate not exceeding double the highest rate which may be in force at the time on the railway for any class of goods.

(4) If any difference arises between a railway servant and the owner or person having charge, or the consignee, of any goods which have been brought to be carried, or have been carried, on a railway, respecting the description of goods of which an account has been delivered under this section, the railway servant may detain and examine the goods.

(5) If it appears from the examination that the description of the goods is different from that stated in an account delivered under sub-section (1), the person who delivered the account, or, if that person is not the owner of the goods, then that person and the owner, jointly and severally, shall be liable to pay to the railway administration the cost of the detention and examination of the

goods, and the railway administration shall be exonerated from all responsibility for any loss which may have been caused by the detention or examination thereof.

(6) If it appears that the description of the goods is not different from that stated in an account delivered under sub-section (1), the railway administration shall pay the cost of the detention and examination, and be responsible to the owner of the goods for any such loss as aforesaid.

Old Acts.

Act IV of 1879... Cf.—S. 15 with S. 58 (1) of the present Act.

Act XVIII of 1954... Cf.—S. 13 with S. 58 (1) of the present Act.

Sub-sections (2) and (3) are new.

No provision in the Old Acts corresponding to sub-sections (4), (5) and (6). Z

(Notes)

(1) Analogous provision.

Cf. —Sub-S. (4), (5) and (6), with S. 101, the Railways Clauses Act, 1845 (8 and 9 Vic., c. 20). A

(2) Section, justification for.

The very common practice of falsely and fraudulently classifying goods is held to justify this section. (See *Statement of Objects and Reasons*, dated the 22nd October 1888). B

(3) Scope of section

S. 58 of Act IX of 1890 is limited to the case of a demand being made by any railway servant appointed in this behalf by the railway administration. So where no such demand is ever made, the conviction under S. 29 Act IV of 1879 (Cf. S. 106 of Act IX of 1890) cannot be supported. 36 P. R. 1895 (Cr.). C

1.—“Requisitions for...goods.”

(1) Misdescription of goods consigned, effect of

Where the consignor's agent had misdescribed the bags of sugar-candy entrusted to the defendant Company as being bags of alum, the misdescription could not by itself exonerate the defendant from all liability in respect of the bags, though the consignor could recover on the basis of the lost bags having contained alum only, and not sugar-candy. 3 B. 120 (130). D

(2) Delivery in bundles—Company, when liable to account for contents in each bundle

Even where a receipt note showed that a particular number of bundles of hides were entrusted to the Company, each bundle containing a specified number of single hides, in the absence of evidence that the bundles have been broken or that the hides had been counted by pieces, the mere circumstance that the Company charged freight by the piece and not by bundles, and had implicitly accepted the enumeration as to the number of pieces in each bundle, would not be sufficient to fix the Company with liability to account for the hides by the piece. 21 W.R. 380. E

Dangerous or of-
fensive goods ¹

59. (1) No person shall be entitled to take with him, or to require a railway administration to carry, any dangerous or offensive goods upon a railway.

(2) No person shall take any such goods with him upon a railway without giving notice of their nature to the station-master or other railway servant in charge of the place where he brings the goods upon the railway, or shall tender or deliver any such goods for carriage upon a railway without distinctly marking their nature on the outside of the package containing them, or otherwise giving notice in writing of their nature to the railway servant to whom he tenders or delivers them.

(3) Any railway servant may refuse to receive such goods for carriage, and, when such goods have been so received without such notice, as is mentioned in sub-section (2) ² having to his knowledge been given, may refuse to carry them, or may stop their transit.

(4) If any railway servant has reason to believe any such goods to be contained in a package, with respect to the contents whereof such notice as is mentioned in sub-section (2) has not, to his knowledge, been given, he may cause the package to be opened for the purpose of ascertaining its contents.

(5) Nothing in this section shall be construed to derogate from the Indian Explosives Act, 1884 or any rule under that Act, and nothing in sub-sections (1), (3), and (4), shall be construed to apply to any goods tendered or delivered for carriage by order or on behalf of the Government, or to any goods which an officer, soldier, sailor, or police-officer, or a person enrolled as a volunteer under the Indian Volunteers Act, 1869, may take with him upon a railway in the course of his employment of duty as such.

Old Acts

Act IV of 1879... Cf—S 16 with sub-sections (1), (2), (3) and (4) of the present Act.

Act XVIII of 1854... Cf—S. 15 with sub-sections (1), (2), (3) and (4) of the present Act.

Sub-section (5) is new.

(Notes).

(1) History of section

See despatch from Secretary of State to Government of India, No. 95, dated 19th July 1882. See also Proceedings of Home Dep., 1st July 1887, Nos 35 to 77.

(2) Scope of section.

(a) This enactment is penal, 1 A. 60 (F.B.) *Per Stuart, C.J.* G

(b) It contemplates a criminal prosecution. (*Ibid.*) H

(c) But, such a law does not interfere with, much less take away, the civil remedy. (*Ibid.*) I

1.—“ Dangerous or offensive goods ”**(1) Railway company not bound to examine every parcel**

Railway servants are not bound to examine every parcel carried by a passenger.

28 C. 401 (P C) = 28 I A 144 = 5 C W.N. 449. J

(2) Goods of a dangerous nature—Duty of person sending notice—Liability of person not giving notice.

A person sending a box containing an explosive substance without giving notice of the dangerous character of its contents will be liable in a suit for compensation for destruction of life brought by the widow of a railway servant who was so injured by the explosion of the contents of the box that he died, although the cause of the explosion was unexplained.

1 A. 60 (F.B.) K

(3) Fireworks.

It would be difficult to say that—are not dangerous goods within the meaning of S. 59 of the Act. 26 C. 465. L

2.—“ As is mentioned in sub-section 2. ”

The words and figure “ Sub-section (2) ” were substituted for the words and figure “ Sub-S (1) ” by the Indian Railways Act, Amendment Act (IX of 1896), S. 3. M

60. At every station¹ at which a railway administration quotes

Exhibition to the public of authority for quoted rates² a rate to any other station for the carriage of traffic other than passengers and their luggage, the railway servant appointed by the administration to quote the rate shall, at the request of any person, show to him, at all reasonable times, and without payment of any fee, the rate-books or other documents in which the rate is authorized by the administration or administrations concerned.

(Old Acts)

Act IV of 1879...S. 9.

Act XVIII of 1854...S. 43.

(Notes)**(1) Analogous provision**

Cf.—S. 4, the Regulation of Railways Act, 1873 (36 and 37 Vic., C. 48).

S. 33, the Railway and Canal Traffic Act, 1988 (51 and 52, Vic., C. 25). N

(2) Source of section.

See Seventh Report, Railway Commissioners, p. 1 O

(3) Ss. 60, 61, scope of.

- (a) Sections 60 and 61, following English Law, require railway administrations to keep open to the inspection of the public, a book showing the rates for the time being charged for the carriage of animals and goods, and to comply with the requisitions for details of gross charges made by and paid to them for the carriage of goods. (See *Statement of Objects and Reasons*, dated 22nd October, 1888.) **P**
- (b) This section is not imperative as regards all stations **Q**
- (c) It is imperative only as regards a "station at which a railway administration quotes a rate." **R**

1.—"Station "

Station defined

According to S. 14, the Regulation of Railways Act, 1873 (*Cf.* present section) a station is a place wherefrom a rate is charged. *Harborne Ry. Co. v. L. & N.W. Ry. Co.* (No. 1), 2 Ry. and Ca. Tr. Cas. 169. **S**

2.—"Exhibition to rates "

(1) Authority for quoted rates exhibited where

- (a) Rate-books ought to be kept at sidings wherefrom goods are conveyed, if the sidings are accessible to the public. *Harborne Ry. Co. v. L. & N.W. Ry. Co.* (No. 1.), 2 Ry. and Ca. Tr. Cas. 169. **T**
- (b) Not so, if they are merely private sidings not forming part of a station. *Pelsall Coal, etc. Co. v. L. & N.W. Ry. Co.* (No. 2), 7 Ry. & Ca. Tr. Cas. 36. **U**
- (c) Rate-books ought to be kept at the station whereat rates are charged, wherever the booking of the goods may be effected. *Jones v. N.W. Ry. Co.*, 2 Ry. and Ca. Tr. Cas. 208. **V**

(2) Kind of rates to be shown

Both through and local rates must be exhibited. *Orlando v. N.E. Ry. Co.* (No. 3), 3 Ry. and Ca. Tr. Cas. 35. **W**

61. (1) Where any charge is made by, and paid to, a railway

Requisitions on railway administrations for details of gross charges.

administration in respect of the carriage of goods over its railway, the administration shall, on the application of the person by whom, or on whose behalf, the charge has been paid, render to the applicant an account showing how much of the charge comes under each of the following heads, namely:—

- (a) the carriage of the goods on the railway,
- (b) terminals;
- (c) demurrage; and
- (d) collection, delivery, and other expenses, but without particularizing the several items of which the charge under each head consists.

(2) The application under sub-section (1) must be in writing, and be made to the railway administration within one month after the date of the payment of the charge by or on behalf of the applicant, and the account must be rendered by the administration within two months after the receipt of the application.

Old Acts.

Act IV of 1879	| No corresponding provision
Act XVIII of 1854	

(Notes).

(1) Analogous provision.

Cf.—S. 17, the Regulation of Railways Act, 1865 (31 and 32 Vic. C. 119).

Cf.—Sub-section (d) with S. 14, the Regulation of Railways Act, 1875, (36 and 37 Vic. C. 48). X

(2) Source of section

See Eleventh Report of Commissioners, p. 6. Y

(3) Scope of Ss. 60 and 61.

See S. 60, *supra*. Z

Carriage of Passengers I.

(Notes).

1.—“Carriage of passengers.”

LIABILITY OF RAILWAY ADMINISTRATION AS CARRIERS OF PASSENGERS.

A—Obligation with regard to safe carriage of passengers.

(1) Duty to carry passengers safely.

The benefit which a carrying Company derives, directly or indirectly, from their carrying passengers, imposes upon them the corresponding obligation of taking due and reasonable care for their safety. *Foulkes v. Metropolitan Dt. Railway Company*, L.R. 5 C.P.D. 157. A

(2) Railway Company—Passenger, carriage of, obligation as to

(a) There is no obligation on a Railway Company to carry a passenger safely; they are only bound to carry him with reasonable care and diligence. 28 C. 401 (P.C.) = 28 I. A. 144 = 5 C.W.N. 449 [*Collet v. The London and N.W. Ry. Co.*, 16 Q.B. 935 (1851), *Expt.*] B

(b) Where through want of due care, a passenger is killed or injured, the railway company must make compensation and may even be made criminally responsible. *McCawley Funness Ry. Co.*, L.R. 8 Q.B. 57. C

(c) The obligation to take due care of the safety of passengers travelling, is attached to the contract between them and the carrier. *Redhead v. Midland Railway Co.*, L.R. 4 Q.B. 379, *appl. in* 2 C.W.N. 609. D

(d) Carriers are insured against all defect which care and skill can guard against. *Hyman v. Nye*, 6 Q.B. D. 685 *appl. to* 2 C.W.N. 109. E

(e) A carrier's undertaking to convey passengers from one place to another, went no further than this that, as far as human care and foresight could go, he would provide for their safe conveyance. *Christie v. Griggs*, 2 Camp Rep. 79, *cited in* 2 C.W.N. 609 (627). F

1.—“Carriage of passengers.”—(Continued).

LIABILITY OF RAILWAY . . . PASSENGERS—(Continued).

A.—Obligation with regard to safe carriage of passengers.—(old.)

(3) Due care, what amounts to.

- (a) An obligation attaches to carriers to use “due care,” that is, a high degree of care, which casts on them the duty of exercising all vigilance to see that what is required for the safe conveyance of their passengers is in the fit and proper order. *Redhead v. The Midland Railway Co.*, L. R. 4 Q. B. 379, *appl.* 2 C. W. N. 60. **G**
- (b) A Railway Company is bound to use the best precautions in known practical use, to secure the safety of its passengers, but not every possible precaution which the highest scientific skill might have suggested. *Ford v. L. and S. W. Ry. Co.*, 2 F. and F. 730. **H**
- (c) Where the plaintiff was injured by the tender of the train being thrown off the line, and the cause was alleged to be the defective tyre of one of the wheels of the tender, the Company was held liable because it was bound to take reasonable care to use the best precautions known in practical use, for securing the safety of their passengers. *Ford v. London and South Western Railway Company*, 2 F. and F. 730. **I**
- (d) It is the duty of a carrier to provide for his passengers a vehicle which shall be free from defects as far as human care and foresight can provide and perfectly road-worthy. *Burns v. Cork and Bowan Ry. Co.*, 13 Ir. Law Rep., p. 543.

(4) Railway Companies are not common carriers of passengers

Railway Companies are not common carriers of passengers, and it is not for them to prove beyond doubt that they are not responsible for the accident. Evidence must be given of their want of care and diligence. 28 C. 401 (P.C.) = 28 I.A. 141 = 5 C.W.N. 419. **K**

B.—Negligence.

I ONLY LIES ON WHOM.

(1) No fixed rule.

- (a) There is—as to *onus*—*Per Ann*, A.L.J. 26 C. 465
- (b) Each case must depend on its own special facts, in some instances, the situation of the parties and the nature of the accident, or the circumstances leading to it, may give rise to a legal presumption of negligence against the defendants; in others, it may be necessary for the plaintiff to establish affirmatively actual negligence before the Company can be made liable. (*Ibid.*) See *Byrne v. Bradle* (1863) 2 H. and C. 722; *Scott v. London Dock Co.*, (1860), 8 C.B. (N.S.) 563; *Kearney v. London Brighton and South Coast Railway Co.*, (1870) L.R., 5 Q.B. 411. **L**

(2) Occurrence of injury, not necessarily importing negligence.

—is not conclusive proof of negligence. *Bird v. O.N. Ry. Co.* 28 L.J. Ex. 3. **M**

I.—“*Carriage of passengers*”—(Continued).

LIABILITY OF RAILWAY . . . PASSENGERS—(Continued).

B.—Negligence.—(Continued).

I ONUS LIES ON WHOM—(Concluded)

(3) Reasonable evidence of negligence

There must be reasonable evidence of negligence. But, when the thing is shown to be under the management of the defendant or his servants, and the accident is such as, in the ordinary course of things, does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care. *Scott v London Dock Co.*, 34 L J. Ex. 220, cited in 9 W R. 73. N

(4) Mere proof of accident

—does not throw on the Railway Company the burden of proving the real cause of the injury. *Tammack v. White*, 11 C.B. (N S) 591. O

(5) Company's negligence—Passenger's negligence—onus.

The onus of proving the Company's negligence lies on the plaintiff, but the onus of proving the passenger's negligence lies on the Company. 24 B. 1. P

(6) Negligence—Onus—S 106, Evidence Act

In a suit brought by the legal representative of a deceased person, who was killed at an accident, while travelling in the train, the onus of proving that there was no negligence on the part of the Railway Company, lies upon it, on the principle of law enunciated in S 106, Evidence Act. 4 M L T. 251. Q

(7) *Prima facie* evidence of negligence

(a) The breaking down of a carriage is—*Dawson v. M S and L Ry. Co*, 5 L. J. 682. R

(b) Running off the rails is—(Ibid).

(c) The fact of an accident occurring through one train running, in the dark, against another train standing still at a station. *Skinner v. L.B. and S C Ry Co*, 15 Jur. 299. S

(d) Omission of a Railway Company to test the tyre of a wheel which has been worn out is—*Manser v. Easter Counties Ry Co*, 3 L T. 585. T

(e) Omission to keep a station properly lighted is—9 W R. 73.

(8) Train running off the line—*Prima facie* evidence of negligence—Rebutted.

If a train runs off the line, there is *prima facie* evidence of negligence, but this can be rebutted by the proof that the accident was through the wilful and wrongful act of a stranger. *Latch v. Rummer Ry.*, 27 L. J. Ex. 155. U

(9) Negligence—Motor Omnibus—Skidding owing to greasy state of road.

The plaintiff was a passenger in a motor omnibus belonging to the defendants.

- Owing to the surface of a road having been rendered greasy by rain, the omnibus skidded and collided with an electric light stand, and the plaintiff was in consequence injured. There was no evidence that the defendant's servants had been negligent in the driving or management of the omnibus, or that there was any defect in the construction

I.—“*Carriage of passengers*”—(Continued).

LIABILITY OF RAILWAY.....PASSENGERS.—(Continued).

B.—Negligence.—(Continued).

I. ONUS LIES ON WHOM—(Concluded).

or condition of the particular *omnibus*. *Held*, that, generally in a case charging negligence, it is for the plaintiff to prove negligence of a duty owing to him, and the mere fact of an accident is not generally *prima facie* evidence of negligence, but, if the cause of the accident be shewn, this may or may not be *prima facie* evidence, according to its nature. *Wing v. London General Omnibus Co.*, (1909) 2 K.B. 652. Y

II FIREWORKS.

(1) Introduction of fire works into a carriage

The—is by itself no evidence of negligence on the Company's part 28 C 401 W

(2) Fireworks in passenger's carriage—Explosion.

ONUS-PRESUMPTION.

(a) (i) Where loss of life and damage had resulted from the explosion of fireworks in the compartment of a passenger carriage, the *onus* was on the Railway Company to shew that they had exercised due care and caution to prevent the fireworks from being so carried, and it was not for the plaintiff to shew that they did not 2 C W N. 609. X

(ii) Under the circumstances and in the absence of evidence, the Court cannot presume that the Railway Company took due care to prevent the carrying of these fireworks, and that the person who carried them concealed them in such a manner that they could not be discovered by the Railway Company. (*Ibid*) Y

(iii) Further, because the carrying of fireworks in a passenger carriage is penal and because every man is supposed to know the law, it cannot be presumed that a passenger would carefully conceal the possession of the fireworks from railway officials. (*Ibid*) Z

(iv) The maxim that every one must be presumed to know the law is limited to the determination of the Civil or Criminal liability of the person whose knowledge is in question, and cannot be legitimately made use of in a case such as the present, where the parties are entirely different and distinct from the person who carried the fireworks 2 C W. N. 609. A

(b) The carrying of fire-works by passenger into the travelling compartments, is a thing which may be prevented by that high degree of care which the Railway Company is bound to exercise for the safety of its passengers, so, where loss of life or damage resulted from the explosion of fireworks in a passenger carriage, the Company will be liable, unless it discharges the burden of proof on it to establish that it had taken due care to prevent the fire-works being carried in that manner. 26 C. 465 = 3 C.W.N 781, but see 28 C.401 (P C). B

(c) In cases where the accident would not, in all probability have happened but for the want of care on the part of the defendant, the plaintiff should be held to have made out *prima facie* case of negligence; and it will be on the defendant to rebut it. See Alexander's case law on trusts, 3rd Edition, p. 39. C

1.—“*Carriage of passengers*”—(Continued).

LIABILITY OF RAILWAY.....PASSENGERS.—(Continued).

B.—Negligence —(Continued)

II. FIRE WORKS—(Concluded).

(d) In a suit for damages for loss of a son who helped his father and whose death was caused by an explosion in a railway carriage, the *onus* is on the plaintiff to prove that the accident was due to a want of reasonable care and diligence on the part of the Railway Company. 28 C. 401 (P.C.) = 28 I.A. 144 = 5 C.W.N. 449. D

(3) Damages, measure of.

As to damage in cases of this nature, distinct evidence of the loss sustained or benefit expected is not necessary 2 C.W.N. 609 ; 16 Bom. 234 (Appr. and Ist). E

(4) Costs.

As to—in a case like this, they should be allowed on such a scale as not to exhaust the damage awarded. 2 C.W.N. 609 (7 B H.C.R. 119 ; 8 B. H.C.R. 120, 130 F.) F

III. ACCIDENTS.

(1) Accidents, when Company liable for.

(a) Where in a matter under the management of a Railway Company or its servants, such an accident happens as in the ordinary course of things does not usually happen, if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant that the accident arose from negligence. *Scott v. London and Dock Co* (1865) 3 H. and C. 596. G

(b) Where a Railway bridge extending over a high-way rested on perpendicular walls having pilasters, and from the top of one of these pilasters fell a brick, shortly after the passing of a train and injured the plaintiff, while passing under the bridge, negligence was presumed against the defendant Company since it was bound to use all reasonable care and diligence in keeping it in such a state of repair that no damage from its defective condition should occur to those who passed under it. *Kearney v. London and Brighton Railway Company*, I.R. 5 Q B 411. H

(c) Where a Railway passenger carriage was rendered insecure, dangerous and unfit for the conveyance of passengers from fireworks being carried therein, and when the carrying of such articles could have been prevented by the exercise of care and skill on the part of the Railway Company, *held*, they were bound to exercise such care and were liable for neglect. 2 C.W.N. 609. I

(d) Where a Railway Company was guilty of negligence in not keeping the station properly lighted, in allowing the train to overshoot the station, and in not warning the plaintiff against alighting, and it was owing to such negligence and not any want of care on the plaintiff's part he sustained the injuries in question, the Company was held liable for damages for such injuries. 9 W.R. 73. (*Davies v. Maim*, 10 M. & W. 54, R.) J

1.—“*Carriage of passengers*”—(Continued).

LIABILITY OF RAILWAY.....PASSENGERS.—(Continued.)

B.—Negligence.—(Continued).

III. ACCIDENTS.—(Concluded).

- (e) Where the negligence on the part of the Railway [Company] was that a gate at a level-crossing was left open, and the gate-keeper was absent, at the time when an express train was overdue, and the person injured passed on to the line, and was knocked down by the train which came up at the moment, *held*, the Railway Company was liable, although it was proved that the person injured might have seen the train approaching, if he had chosen to look. *Stapley v The London, Brighton, and South Coast Ry. Co.*, *L.R. Erch* 21, cited in 9 W.R. 73. **K**
- (f) A person may be liable for the consequences of an accident resulting from his own negligence in combination with other causes, which he did not contemplate. *Lynch v. Nudlin*, 4 P. and D. 672. Cited in 1 A. 60. **L**

(2) Accidents, when Company not liable for.

- (a) Where the plaintiff who was standing under a portico looking at a timetable was injured by the fall of a timber and a roll of zinc from the roof, in the absence of evidence that the defendant Railway Company knew or had the means of knowing that the roof needed repairing, no case of negligence was held to have been made out against the Company. *Welfare v. London and British Railway Company*, *L.R.* 4 Q.B. 693. **M**
- (b) When the accident arose under circumstances and from a cause quite outside the control of the Company, the latter could not be held liable for damages resulting therefrom. *Daniel v. Metropolitan Company*, (1871) *L.R.* 5 IV and I, Ap 45. **N**

IV.—TRAINS OVERSHOOTING PLATFORM.

Negligence—Trains overshooting platform—Invitation to alight.

- (a) In order to establish negligence arising from invitation to alight, against a Railway Company, it is not sufficient to prove that the carriage in which the plaintiff was travelling did overshoot the level portion of the platform and was drawn up alongside the slope, and that the plaintiff's injuries were received by a shock or fall on alighting and not by a fall after he had alighted. But the plaintiff must go further and show that the situation in which he was placed by the invitation to alight at the particular spot, exposed him to danger which was not visible and apparent, or that he was invited to alight in an unsafe and improper place. 7 Bom. *L.R.* 119. See the decision in 34 *I.A.* 115=9 Bom. *L.R.* 671=11 C. W. N. 721=17 *M. L. J.* 347; *Weller v. London, Brighton and South Coast, Ry. Co.*, (1874) 9 C. P. 126, *Budges v. North London Ry. Co.*, (1871) 6 Q.B. 377 (406), C. **O**
- (b) Mere overshooting, even with an invitation to alight, is not necessarily or by itself negligence. (*Ibid.*) **P**
- (c) To constitute negligence, there must be on the part of the Railway Company some further act or omission which exposes the passenger to a danger not visible and apparent, in other words, such danger as a passenger of ordinary caution could not reasonably be expected to avoid. (*Ibid.*) **Q**

I.—“*Carriage of passengers*”—(Continued.)

LIABILITY OF RAILWAY.....PASSENGERS.—(Continued.)

B.¹—Negligence.—(Continued.)

IV. TRAINS OVERSHOOTING PLATFORM—(Concluded.)

- (d) An invitation to passengers to alight on the stopping of a train, without any warning of danger to a passenger who is so circumstanced as not to be able to alight without danger, such danger not being visible and apparent, amounts to negligence. *Cockle v. South Eastern Railway Co.*, (1872) 7 C P 321 (326), cited in 7 Bom. L R at p. 127. R

V. NEGLIGENCE THROUGH DOORS OPENING AND ACCIDENTS THROUGH SHUTTING DOORS.

(1) Duty of Railway Company to shut doors of carriages.

- (a) It is the duty of the Railway Company to see that the doors of the carriages are properly shut and fastened before the train leaves any particular station. 24 B, (*Clee v. Metropolitan Ry. Co.*, (1873) L.R. 8 Q. B. 161 *Metropolitan Ry. Co. v. Jackson*, (1877), 3 Ap. Ca. 193, *Richards v. Great Eastern Ry. Co.*, (1873) 28 L T (N S) 711; *Adams v. Lancashire and Yorkshire Ry. Co.*, (1869) L R 4 C P. 739, *Followed.* S
- (b) The fact of the finger of a passenger seated in a railway carriage being crushed, owing to the shutting of the carriage door by a railway servant on the platform is not evidence of negligence on the company's part. *Drury v. N E. Ry. Co.*, (1901) 2 K.B. 322 T

(2) Shutting of carriage doors

- (a) Railway servants are not bound to give warning of the shutting of a carriage door to a passenger who is actually seated inside the carriage, and is not in the act of getting in or out of it. *Drury v. N E. Ry. Co.*, (1901) 2 K B. 322. U
- (b) A plaintiff after taking his seat, left his hand for about half a minute on the door-jamb. The guard called out to the passengers to take their places. Then, he shut the doors of the carriages. The plaintiff's thumb was injured. *Held*, that the plaintiff was guilty of negligence. *Richardson v. Met. Ry. Co.*, 37 J. J C.P. 300. V

(3) Leaving the door open or unfastened.

—amounts to negligence on the part of the Railway Company, for the consequence of which the Company is liable for any injury caused thereby to the passengers. 24 B 1=1 Bom. L R 254 (258). W

(4) Leaving door of a railway carriage open or unfastened—Hurt caused to passenger while trying to secure door.

The door of a railway compartment in a train running from Poona to Bombay was left open or unfastened when the train left the Khandala station. The plaintiff was then asleep in the carriage. Subsequently, he awoke when the train was passing through a tunnel, and found that the whole of the door, which opened outwards, had been torn away from its hinges, except the upper part or sunshade, which was flapping backwards and forwards, against the side of the tunnel, and the door post of the carriage. In attempting to secure it, the top of the plaintiff's finger was torn away and the bone of one of his fingers fractured. *Held*, that the injury was caused by the negligence of the Railway Company, and the plaintiff was entitled to damages. 24 B. 1. X

1.—“*Carriage of passengers*”—(Continued)

LIABILITY OF RAILWAY.....PASSENGERS.—(Continued).

B.—Negligence.—(Continued)

VI. DUTY OF RAILWAY COMPANY TOWARDS PERSONS WHO VISIT STATIONS.

Persons visiting Stations.

(a) A Railway Company is liable, if persons, who with the Company's permission visit stations, suffer injuries while on the Company's premises by reason of the negligence of its servants. *Watkins v. G.W. Ry. Co.*, 46 L.J. C.P. 817. **Y**

(b) So also, if a consignee of goods entering the station premises with the permission of the railway servants for assisting the unloading of his goods, sustains injuries owing to the insecure condition of the station premises. *Holmes v. N.E. Ry. Co.*, L.R. 6 Ex. 123. **Z**

VII.—DAMAGES.

(1) Weighing machines allowed to be on platform—Injury by falling over—Damages.

(a) Allowing a weighing machine to be on a platform, in a usual place is not of itself negligence. *Connors v. Eastern Ry. Co.*, 29 L.J. Ex. 94. **A**

(b) So, no damages will be given to a person who sustains injuries by falling over the same. (*But*) **B**

(c) Damages will be awarded, if plaintiff is injured by falling over a box containing two signal levers projecting about two inches above the level of the platform. *Sturges v. G.W. Ry. Co.*, 56 J.P. 278. **C**

(2) Liability of Railway Company—Damages

A person sustaining injuries through the rash and negligent conduct of a railway servant is entitled to damages. *Tebbut v. Bristol and Exeter Ry. Co.*, L.R. 6 Q.B. 73. **D**

(3) Injury to passenger trying to prevent danger from Company's negligence.

If any inconvenience or danger is caused by the negligence of the Company, a passenger may lawfully attempt to get rid of any such inconvenience or danger, provided that in doing so he runs no obvious risk disproportionate to the inconvenience or danger, and is not himself guilty of any negligence, and, if in such attempt he is injured, the Company is liable in damages. 24 B. 1—1 Bom. L.R. 254 *Robinson v. North Eastern Ry. Co.*, (1875) L.R. 10 Q.B. 271, *Lee v. Nirey*, (1890) 63 L.T. 285, *Wakelen v. N. & S.W. Ry. Co.* (1886) 12 Ap. Ca. 41, *Engelpart v. Farrant & Co.*, (1897) 1 Q.B. 240, *followed*. **E**

(4) Personal injuries—Damages—Mode of assessment.

(a) THE FOLLOWING WILL BE TAKEN INTO CONSIDERATION IN ASSESSING DAMAGES:—

(i) The pain and suffering of the person injured, **E1**

(ii) The expenses incurred for medical and other necessary attendance, **E2**

(iii) The loss sustained through his inability to continue a lucrative professional practice. 24 B.1 **F**

(iv) Loss of profits of the plaintiff's business. *Bradshaw v. L & Y Ry. Co.*, L.R. 10 C.P. 1893. **G**

1. — "Carriage of passengers"—(Continued).

LIABILITY OF RAILWAY.....PASSENGERS.—(Continued).

B.—Negligence.—(Continued).

VII. DAMAGES—(Concluded).

(v) Possible increase of his income. *Farr v. L & N.W. Ry Co.*, 21 L.T. 326. H

(b) THE FOLLOWING WILL NOT BE TAKEN INTO ACCOUNT IN REDUCTION OF DAMAGES —

(i) Monies received by the plaintiff under an accident insurance policy. *Eradshaw v. G. W. Ry. Co*, L.R. 10 Ex. I

(ii) So also policy monies.

Grand Trunk Ry. Co. of Canada v. Jennings, L.R. 13 App. Cas., 800. J

VIII.—FATAL ACCIDENTS ACT (XIII OF 1855)—COMPENSATION.

(1) Death of passenger caused by negligence of a Railway Company, compensation for.

For—See Act XIII of 1855.

K

(2) Mode of assessing damages.

——— in a suit under Act XIII of 1855 for compensation for destruction of life. See 1 A 60 (F.B.). L

(3) Law Prior to Act XIII of 1855 and subsequent to that Act—Nature of suit to be brought under Act XIII of 1855

(a) The law before the passing of the Act XIII of 1855 (which was founded on Lord Campbell's Act, 9 and 10 Vic, C. 92) was based on the maxim *actio personalis moritur cum persona*, and no action or suit was maintainable against a person who by his wrongful act, neglect, or default caused the death of another person. See Preamble to Act XIII of 1855. M

(b) But Act XIII of 1855, empowers executors, etc., to sue for damages for benefit of the wife, husband, parent, and child of any person whose death shall have been caused by any wrongful act, neglect, or default which, if death had not been caused would have entitled the party wronged, to sue for and recover damages in respect of it, although the death may have been caused under such circumstances as amount in law to murder or any other crime. See S. 1 of Act XIII of 1855. N

(c) Suits can only be brought under this Act for acts, etc., for which the deceased could have sued if he had not been killed. (*Ibid*). O

(d) Thus, where a servant is killed in the service of his master, the master is not liable for negligence for which the servant could not have sued him. *Senior v. Ward*, 1 E. and E. 395; K.N. Roy, p. 87, *Starling*, 4th Ed., p. 164. P

(e) The action can be only for the benefit of the wife, husband, parent and child of the deceased 1 A 60 (F.B.); 7 B H.C. 113; see S. 1 of Act XIII of 1855 Q

(f) The pecuniary loss sustained by the survivors through the death is all that can be recovered. *Blake v. Midland Railway Co.*, 18 Q.B. 93. R

1.—“*Carriage of passengers.*”—(Continued).

LIABILITY OF RAILWAY.... PASSENGERS—(Continued).

B.—Negligence—(Continued):

VIII. FATAL ACCIDENTS ACT (XIII of 1855)—COMPENSATION—(Continued).

(4) The precise nature of the right conferred by Act XIII of 1855 (Fatal accidents).

(a) As stated in the preamble of the Act itself, the relations of a person, whose death was caused by the wrongful act of another were not, prior to its enactment, entitled to claim compensation on account of the death 28 M. 479. **S**

(b) The right to claim compensation in respect of such a death was created by the Act. (*Ibid.*) **T**

(c) It is provided that every suit shall be for the benefit of certain specified near relations of the deceased “and shall be brought by and in the name of the executor, administrator or representative of the person deceased.” (*Ibid.*) **U**

(5) Representative, meaning of.

(a) The word “representative” means and includes all or any one of the persons for whose benefit a suit under the Act (XIII of 1855) can be maintained. 28 M. 479. **V**

(b) These persons are the representatives of the deceased, in the sense, that they are persons taking the place of the deceased in obtaining reparation for the wrong done. (*Ibid.*) **W**

(c) A son adopted, under the Hindu law, by the widow of the deceased, was held to be the legal representative of the deceased for the purposes of bringing a suit under Art. 21, Limitation Act (1908). 7 B.H.C. 113. **X**

(6) Suit for compensation.

(a) In cases where the deceased is represented by an executor or an administrator, such an executor or administrator is given the power to sue for compensation for the benefit of the specified relations 28 M. 479. **Y**

(b) Where there is no executor, or administrator, or where there is one, and he fails or is unwilling to sue, then the suit may be instituted by, and in the name of, the representative of the person deceased. (*Ibid.*) **Z**

(c) But one suit only is allowed to enforce the claims of all persons beneficially entitled,—it being provided that the rights of each and every one of them shall be adjudged and adjusted by the Court in such suit. (*Ibid.*) **A**

(d) The right of each beneficiary is only to receive compensation in proportion to the loss occasioned to him by the death of his deceased relative. (*Ibid.*) **B**

(e) From this it follows, and it was in effect so decided in *Pym v. The Great Northern Ry. Co.* (4 B. S. 396) with reference to the provisions of Lord Campbell's Act, that the right of the beneficiaries to compensation is a right distinct in each. (*Ibid.*) **C**

1.—"Carriage of passengers"—(Continued).

LIABILITY OF RAILWAY.....PASSENGERS—(Continued).

"B.—Negligence—(Concluded).

VIII. FATAL ACCIDENTS ACT (XII. of 1855)—COMPENSATION—(Concluded).

(f) In short, the beneficiaries entitled to compensation under Act XIII of 1855 are not persons entitled to compensation jointly, but are parties entitled to relief severally, in respect of the same cause of action which is enforceable at the suit of all or any one of them suing for himself and the rest. (*Ibid.*) **D**

(7) Death caused by goods of an explosive nature.

(a) The person who sends, by Railway, goods of a dangerous and explosive nature without giving notice of its character to the servants of the Railway Company, must compensate for loss of life caused by the explosion of the articles sent, though the sender could not have foreseen the explosion. 1 A 60 (F B.). **E**

(b) *Pearson, J., dissenting, held*, but that the defendant, who could not have foreseen the explosion, would be liable, only if he omitted to take reasonable precautions to preclude the risk of explosion (*Ibid.*) **F**

C.—Contributory negligence.

(1) Person bringing action for injury not to be guilty of contributory negligence

(a) A person bringing an action against a Railway Company for injury sustained must not be guilty of negligence contributing to his own injury. *Ridley v. L. and N. W. Ry. Co.*, 1 L.R. 1 App. Cas. 751 **G**

(b) Even if he has been guilty of negligence, his negligence will not excuse the Railway Company, if the company, could, in the result, by the exercise of ordinary care and diligence, have avoided the injury (*Ibid.*) **H**

(c) This rule is applicable equally if the plaintiff owing to his youth has not capacity enough for exercising due care and caution. *Abbot v. Marjie*, 2 H. and C. 741 **I**

(2) Contributory negligence arises when.

(a) Where a deaf person does not hear a warning of an approaching train given by a railway servant, he can be said to be guilty of contributory negligence. *Sheeton v. L. and N. W. Ry. Co.*, 1 L.R. 2 C.P. 631. **J**

(b) The same is the case, if the warning proceeds from a person other than a railway servant. *Stubley v. L. and A. W. Ry. Co.*, 1 L.R. 1 Ex. 13 **K**

D.—Unpunctuality of trains—Liability of railway administration.

(1) Issuing of ticket.

Mere— is not a warrant, that the train shall arrive at the time specified. *Hurst v. G. W. Ry. Co.*, 34 L.J. C.P. 264. **L**

(2) Publication of time-tables—Effect

Since the publication of time-tables implies that a train shall run as advertised, a Railway Company will be liable (if knowing that a connecting has been taken off, it has advertised a through train) to pay damages to a passenger who has started on his journey assuming that a connecting train is running. *Denton v. G.N. Ry. Co.*, 25 L.J.Q.B. 129. **M**

1.—“Carriage of passengers”—(Concluded).

LIABILITY OF RAILWAY.PASSENGERS—(Concluded.)

D.—Unpunctuality of trains—Liability of railway administration.

(3) Unpunctuality of trains—Damages.

I. ENGLISH LAW.

(a) DAMAGES RECOVERABLE.

(i) Hotel bills can be recovered from the Railway Company by a passenger who has been delayed on account of the unpunctuality of the trains
Hamlin v. G.N. Ry Co. 26 L J. Ex 20. **N**

(ii) So, also, damages for the inconveniences of having to walk home
Hobbs v. L & S W Ry. Co., L.R. 10 Q B. 111. **O**

(b) DAMAGES NOT RECOVERABLE

(i) A passenger delayed on his journey on account of the unpunctuality of the trains, cannot recover his doctor's bill if he catches cold in consequence of his having to walk home
Hobbs v. L & S W Ry Co., L.R. 10 Q B 111 **P**

(ii) Nor will he have the right to recover damages for loss of custom, because he lost appointment. *Hamlin v. G N Ry Co*, 26 L J Ex 20 **Q**

II. INDIAN LAW.

UNPUNCTUALITY OF TRAINS—AMOUNT OF DAMAGES RECOVERABLE.

See S. 78, *infra*

62 The Governor-General in Council may require any rail-

Communication
between passengers
and railway servants
in charge of trains

way administration to provide and maintain in proper order, in any train worked by it which carries passengers, such efficient means of communication between the passengers and the railway servants in charge of the train as the Governor-General in Council has approved.

Old Acts

Act IV of 1879) No corresponding provision
Act XVIII of 1854	

(Notes).

Analogous provision

Cf. S. 22, the Regulation of Railways Act, 1868 (31 and 32 Vic., C 119) **R**

1.—“Communication....trains.”

Duty to provide communication.

Semble —A railway administration is under no obligation, statutory or otherwise, to provide any communication as stated here, unless so required to do by the Governor-General. *Conder v. Ballaprased*, Printed Judgments, Bom. (1895), p. 92. **S**

63. Every railway administration shall fix, subject to the approval of the Governor-General in Council, the maximum number of passengers which may be carried in each compartment¹ of every description of carriage, and shall exhibit the number so fixed in a conspicuous manner inside or outside each compartment in English, or in one or more of the vernacular languages in common use in the territory traversed by the railway, or both in English and in one or more of such vernacular languages, as the Governor-General in Council, after consultation with the railway administration, may determine.

• Old Acts

Act IV of 1879)
Act XVIII of 1854.) No corresponding provision.

(Notes)

Analogous provision.

Cf. the English Bye-law, No. 14.

T

I—"Compartment."

Compartment.

(a) There is no definition in the Act of the word— 24 B 293=1 Bom. I.R. 688. **U**

(b) It is possible that it may be used in different senses in the various sections of the Act. (*Ibid.*) **Y**

64. (1) On and after the first day of January 1891, every railway administration shall, in every train carrying passengers, reserve for the exclusive use of females one compartment¹ at least of the lowest class of carriage forming part of the train

Reservation of compartments for females.

(2) One such compartment so reserved shall, if the train is to run for a distance exceeding fifty miles, be provided with a closet.

Old Act.

This section is new.

(Notes).

General.

Scope of section.

This section requires every railway administration to reserve in every passenger-train at least one compartment of the lowest class for the exclusive use of females. (See *Statement of Objects and Reasons*, dated 22nd Oct. 1888.) **W**

I.—“ Compartment.”

Compartment, meaning of.

A “ compartment ” means a division of the railway carriage separated from the other division by partition right up to the roof of the carriage, each such division being completely screened off from its adjoining division.
24 B. 293=1 Bom. L.R. 688. **X**

N.B.—See also the same case noted under S. 63, *supra*.

65. Every railway administration shall cause to be posted in a conspicuous and accessible place at every station on its railway in English, and in a vernacular language in common use in the territory where the station is situate, a copy of the time-tables¹ for the time being in force on the railway, and lists of the fares chargeable for travelling from the station where the lists are posted to every place for which card-tickets are ordinarily issued to passengers at that station.

Exhibition of time-tables and tables of fares at stations

Old Acts

Act IV of 1879 .. S. 9.

Act XVIII of 1854 .. S. 43

(Notes)

Analogue provision.

Cf. S. 15 of the Regulation of Railways Act, 1868 (31 and 32 Vic., C. 119). **Y**

I.—“ Time-tables.”

Publication of time tables—Effect.

On the publication of time-tables, a company promises that a train shall run as advertised. *Denton v. G. N. Ry. Co.*, 25 T. J. Q. B. D., 129. **Z**

66. (1) Every person desirous of travelling on a railway shall, upon payment of his fare¹ be supplied with a ticket² specifying the class of carriage for which, and the place from, and the place to, which, the fare has been paid, and the amount of the fare

Supply of tickets on payment of fares.

(2) The matters required by sub-section (1) to be specified on a ticket shall be set forth—

(a) if the class of carriage to be specified thereon is the lowest class, then in a vernacular language in common use in the territory traversed by the railway, and

(b) if the class of carriage to be so specified is any other than the lowest class, then in English.

Old Acts.

Act IV of 1879 ... S. 17.

Act XVIII of 1854 ... S. 1.

(Notes).

1.—“Fare.”

(1) Right of traveller to be conveyed by carrier of passengers.

“The common law right of a traveller to be conveyed by the carrier of passenger on readiness to pay the usual fare, is subject to the condition that he offers himself as a passenger at a reasonable time and place.” 1 Bom. 52 (58). **A**

(2) “Fare” meaning of.

(a) Wharton's Law Lexicon defines “fare” as “the money paid for a passage either by land or by water” **B**

(b) In Stroud's Judicial Dictionary, “His fare” in 8 Vic., C. 20, S. 103, is defined as the fare by the train, and for the class of carriage in which the passenger travels.” **C**

(c) Webster's Dictionary defines fare as (1) “the price of a passage or going”, (2) “the sum paid or due for conveyance of a person by land or water” **D**

(d) *Fare* means the amount fixed for taking a passenger from one station to another 4 M R 548. **E**

¶3) Railway fare—Bye law

A bye-law of a Railway Company provided that “every person attempting to defraud the Railway Company by, in any manner, endeavouring to evade payment” of his full fare, is liable to fine of Rs. 100. A passenger handed over his luggage to a fellow passenger and the Company proceeded against him under this bye-law for evading payment for his luggage 4 M R 548 **F**

2.—“Ticket”

(1) Right of passengers to have ticket issued during journey

(a) A Railway servant is not bound to issue a ticket to a person starting on his journey without taking a ticket at a station between that at which he started and the station of destination. He can be removed from the train as a trespasser. 1 B 51 (58). **G**

(b) “It would be most inconvenient and unreasonable, regarded from a public point of view, were the Court to hold that a passenger by a train has a right to require the station-master, on the arrival of the train at an intermediate station, to leave the platform, where he has special duties connected with the train and passengers, and return to his office for the purpose of procuring him a ticket. (*Ibid*)” **H**

(c) It is the general practice of an intermediate station-master to close the office for the distribution of tickets on the arrival of the train.” (*Ibid*) **I**

(d) “This practice has been adopted to enable the officials, and more especially the station masters, to attend to the particular matters which arise during the stoppage of the train in the station.” (*Ibid*.) **J**

(e) There is no ground upon which a passenger by a train can claim to have the distribution of tickets resumed on his behalf, which had been already closed for the public outside the station (*Ibid*.) **K**

¶2) Duty of passengers and their liability.

(a) Under Ss. 17 and 31, Act IV of 1879 (*Cf.* Ss. 66, 69, 113, present Act) no passenger is to travel without a proper ticket (an ordinary one for the particular journey or a season ticket) furnished by the Company. 12 C. 192. **L**

2.—“Ticket” —(Concluded).

(b) Every passenger is to show or deliver up his ticket when called upon.
(*Ibid.*) **M**

(c) Any passenger, who fails in either of these points, is liable, whether a season-ticket-holder or not, to pay the ordinary fare for his journey, or, if he cannot show where he got into the train, the ordinary fare from the starting point of the train. (*Ibid.*) **N**

(3) Action by passenger against Railway Company, for personal injuries resulting from negligence of servant of Company.

(a) Where a passenger brings an action against a Railway Company for personal injuries caused by the negligence of the railway servant, such action is founded on tort and not on contract, though the passenger has taken a ticket. *Taylor v. W. & L. Ry Co.*, (1895) 1 Q.B. 131. **O**

(b) This is the case even though the negligence consists in the doing, or the omitting to do the act. *Kelly v. Met. Ry. Co.*, (1889) 1 Q.B. 911. **P**

(4) Liability of carrying-company—Passenger not taking tickets.

(a) Though passengers may not have taken their tickets from the carrying company, yet such a company owes a duty to passengers on it to carry them safely. *Foulkes v. Met. District Ry. Co.*, L.R. 5 C.P.D. 157. **Q**

(b) “I think that the true principle in such a case as the present is that the company, so far as concerns its own line, in which term I include a line over which running powers are exercised, and its own acts and omissions, is to do the same obligations in reference to the security of the passenger, as it would have been if he had directly contracted with him.” (*Ibid.*) **R**

(c) Though a passenger has not paid his fare, if he has not attempted to defraud the Company by such non-payment, and is in the train with its authority, the Company will hold itself responsible for carrying him safely. *Austin v. G. W. Ry. Co.*, L.R. Q.B. 911. **S**

Provision for case in which tickets have been issued for trains not having room available for additional passengers

67 (1) Fares shall be deemed to be accepted, and tickets to be issued, subject to the condition of there being room available in the train for which the tickets are issued ¹

(2) A person to whom a ticket has been issued, and for whom there is not room available in the train for which the ticket was issued, shall, on returning the ticket within three hours after the departure of the train, be entitled to have his fare at once refunded.

(3) A person for whom there is not room available in the class of carriage for which he has purchased a ticket, and who is obliged to travel in a carriage of a lower class, shall be entitled, on delivering up his ticket, to a refund of the difference between the fare paid by him and the fare payable for the class of carriage in which he travelled.

Old Acts.

Act IV of 1879... Cf. S. 18 which sub-sections (1) and (2) of the present Act.
 Act XVIII of 1854.... Cf. S. 2 with sub-sections (1) and (2) of the present Act.
 „Sub-section (3) is new.

(Notes).**(1) Omission of provision re preferential right of ticket-holders found in S. 18, Act IV of 1879, reason for.**

The provisions of section 18 of the Indian Railway Act 1879 respecting the preferential rights of ticket-holders, have been omitted as being unnecessary and in practice unworkable. See *Statements of Objects and Reasons*, dated the 22nd Oct 1888. **T**

(2) Omission of proviso re the carriage of troops, found in S. 18, Act IV of 1879, reason for.

The carriage of troops on a railway administered by companies, is regulated by the contract between the Government and the companies. (*Ibid.*) **U**

I —“Fares shall be deemed... issued.”**Reserved accommodation — Waiver of benefit by Railway Company**

- (a) Under S. 67 of the Act, “fares shall be deemed to be accepted and tickets to be issued subject to the condition of there being room available in the train for which the tickets are issued.” 30 M. 417 (418). **Y, W**
- * (b) This is a provision introduced for the protection of the railway, and on the principle *Quilibet potest renunciare jura pro se introducto*, it is open to it to waive the benefit of this section (*Ibid.*) **X**
- (c) But the railway administration cannot be considered to have waived the protection, merely because it allowed the plaintiffs to take advantage of the rule which entitles first-class passengers, in travelling together, to a reserved compartment, when practicable. (*Ibid.*) **Y**
- (d) The reserved compartment must be deemed to have been applied for and granted on the usual terms that “reserved carriages in mail trains can only be provided when the load of the train permits” (*Ibid.*) **Z**
- (e) So, where the Railway Company did not provide the plaintiffs with a reserved carriage in a mail train, on the ground that the load of the train did not permit, it was held that the Company was not liable in damages. (*Ibid.*) **A**
- (f) In such a case, the plaintiffs will only be entitled to the statutory relief given by this section. (*Ibid.*) **B**

68 No person shall, without the permission of a railway servant, enter any carriage on a railway for the purpose of travelling therein as a passenger, unless he has with him a proper pass or ticket¹.

Prohibition
 against travelling
 without pass or
 ticket.

Old Acts.

Act IV of 1879 S. 19.
 „ XVIII of 1854 S. 1.

(Notes).**Analogous provision.**

Cf. the English Bye-law No. 1

1.—“No person....ticket.”

(1) “A proper pass or ticket.”

By the words “—” in S. 68, must be understood “a pass or ticket by which the person would be authorised to enter the carriage for the purpose of travelling therein as a passenger.” 9 C P.L.R. 1 (2) (Cr.). **D**

(2) Railway ticket not used on day of issue.

(a) One of the rules made by a Railway Company under S. 47 of the Act, is that tickets are only available on the day of issue. 1 Weir 870. **E**

(b) Therefore, a ticket not so availed of, is not a proper ticket within the meaning of S. 68 of the Act. (*Ibid.*) **F**

(3) Permission to enter railway carriage without ticket—Effect

If a person is permitted by a railway official to enter into a carriage without having taken a ticket, such permission, if it amounts at all to leave and license to the passenger to travel in the train without a ticket, can only operate as such until the train stops at the next station. 1 Bom 52 (57). **G**

69. Every passenger by railway shall, on the requisition of any

Exhibition and surrender of passes and tickets 1 railway servant appointed by the railway administration in this behalf, present his pass or ticket to the railway servant for examination, and, at or near the end of the journey for which the pass or ticket was issued, or in the case of a season pass or ticket, at the expiration of the period for which it is current, deliver up the pass or ticket to the railway servant.

Old Acts

Act IV of 1879 .. S. 17.

Act XVIII of 1854 .. S. 1.

(Notes)

Analogous provision.

Cf. the English Bye-law No 1. **H**

1.—“Exhibition and surrender of passes and tickets.”

(1) Ss. 17, 31, Act IV of 1879 (Cf. Ss. 69 and 113, present Act)—Duty of passengers and their liability.

(a) Under Ss. 17 and 31, Act IV of 1879, the railway administration is to furnish every passenger with a proper ticket. 12 C. 192 (196). **I**

(b) No passenger is to travel without a proper ticket (an ordinary one for the particular journey or a season ticket) furnished by the company (*Ibid.*). **J**

(c) Every passenger is to show or deliver up his ticket when called upon. (*Ibid.*) **K**

(d) And any passenger, who fails in either of these points, is liable (whether a season ticket-holder or not to pay the ordinary fare for his journey, or if he cannot show where he got into the train, the ordinary fare from the starting point of the train. (*Ibid.*) **L**

1.—“*Exhibition and surrender of passes and tickets*”—(Concluded).(2) **Tickets, production of.**(a) **ENGLISH LAW.**

According to the English Law, season tickets as well as ordinary tickets must be produced, if required. *Woodard v. Eastern Counties Ry. Co.*, 4 L.T. 386. **M**

(b) **INDIAN LAW.**

(i) Every passenger, whether a season ticket-holder or not, may be called upon to show his ticket. 12 C. 142 (196). **N**

(ii) And, if he is so called upon and has not got his ticket with him to show, he may be required to pay the ordinary fare. (*Ibid.*) **O**

(3) **Tickets to master for himself and his servants.**

Where a Railway Company has issued tickets to a master for himself and his servants, it has no right to refuse to carry the servants because they have not got the tickets with them. *Jennings v. G. W. Ry. Co.*, L. R. 1 Q. B. 7. **P**

(4) **Slandorous demand of ticket by Railway guard.**

The mere fact that the guard of a train, in the execution of his duty, expressed to a passenger in the presence of others a suspicion, not altogether unfounded, that such passenger was travelling with a wrong ticket, cannot render the Railway Company liable in damages to him for slander. 13 M. 34 (39). **Q**

70. A return ticket or season ticket shall not be transferable, and may be used only by the person for whose journey to and from the place specified thereon it was issued.

Return and season tickets 1.

Old Act.

This section is new.

(Notes)**Analogous provision.**

Cf. the English 'Bye-law No. 5.

R

1.—“*Return and seasons tickets.*”(1) **Applicability of Ss. 70 and 114—Sale or transfer of single ticket**

(a) Ss. 70 and 114 of the Act apply only to return or season tickets. 1 Weir 872. **S**

(b) The sale or transfer of single ticket is neither prohibited nor rendered penal by the Act. Where the accused bought a large number of tickets from the Railway Company during a festival and sold one of them at a rate higher than those for which he had bought them, *held*, that the accused was not guilty of cheating under S 417, Penal Code, inasmuch as the person who bought the ticket admitted that he was aware of the higher rate and was not misled. (*Ibid.*) **S-1**

(2) **Return-ticket-holder.**

A—has the right only to travel to, and from the station specified on the ticket. *G. W. Ry. Co. v. Pocock*, 41 L.T. 415. **T**

71. (1) A railway administration may refuse to carry, except in accordance with the conditions prescribed under section 47, sub-section (1), clause (d), a person suffering from any infectious or contagious disorder.

Power to refuse to carry persons suffering from infectious or contagious disorder.

(2) A person suffering from such a disorder shall not enter or travel upon a railway without the special permission of the station-master or other railway servant in charge of the place where he enters upon the railway.

(3) A railway servant giving such permission as is mentioned in sub-section (2) must arrange for the separation of the person suffering from the disorder from other persons being or travelling upon the railway.

Old Acts.

Act IV of 1879 ... S. 20.
Act XVIII of 1854 ... No corresponding provision.

(Notes).

Analogous provision.

Cf. the English Bye-law No. 16.

CHAPTER VII.

RESPONSIBILITY OF RAILWAY ADMINISTRATIONS AS CARRIERS.

(Notes).

1.—“Chapter VII.”

Material modification deemed not necessary.

- (a) “Chapter VII follows the rule embodied in S. 10 of the Indian Railways Act, 1879.” (See Statement of Objects and Reasons) **U**
- (b) “There have been very few complaints against the practical operation of this rule, which is based upon a judgment of the Bombay High Court reported at I.L.R. 3 B. 109, and though the soundness of that judgment has been questioned, the Government of India, as at present advised, is of opinion that experience does not justify any material modification of existing legislation.” (*Ibid.*) **Y**

2.—“Responsibility of Railway Administrations as Carriers.”

I.—GENERAL.

(1) Responsibility of carriers by railway.

- (a) The Railway Act of 1890 reduces the—to that of bailees under the Act of 1872. 18 C. 620 (628) (P.G.). **W**
- (b) But then it declares that nothing in the common law of England, or in the Carrier’s Act, 1865, shall affect the responsibility of carriers by railway. (*Ibid.*) **X**
- (c) The reason for dealing with railways in this exceptional manner may perhaps be found in the circumstance that railways in India are to a great extent in the hands of the Government, and it will be remembered that the Government is excepted from the definition of a common carrier in the Act of 1865. (*Ibid.*) **Y**

(2) Who is a common carrier.

- (a) To make one a common carrier, the employment of such carrier must be habitual. See Story on Bailments, 495, 500. **Z**
- (b) It must be a public business, so that the carrier would be liable for a refusal to carry. (*Ibid.*) **A**
- (c) One undertaking jobs for special bargains, and not professing to carry generally, is not a common carrier. (*Ibid.*) **B**

2.—“Responsibility of Railway Administrations as carriers”—(Continued).

I.—GENERAL—(Continued).

(3) Common carriers, duties and responsibilities of—English law.

- (a) A carrier of goods was bound by the English law to receive all goods brought to him for carriage, provided he had conveniences to carry them, and the employer was ready to pay any reasonable award for the conveyance. See *Pickford v. The Grand Junction Ry. Co.*, 8 M. and W. 373; *Johnson v. The Midland Ry. Co.*, 4 Ex. 367 cited in 10 C. 166 (182). **C**
- (b) And a tender of the hire is not needed. *Pickford v. Grand J. Ry. Co.*, 8 M. and W. 572. **D**
- (c) A common carrier may not raise the rates to different persons. *Johnson v. Midland Ry. Co.*, 4 Exch. 367. **E**
- (d) But the carrier may object that the goods are not such as he carries, or that he has no room. (*Ibid.*) **F**
- (e) The direction of the owner must be obeyed. See Story on Bailments, 590.
- (f) When required, there must be re-delivery to the consignor. (*Ibid.*) **G**
- (g) The carrier is bound to use exact diligence, safely and securely to carry the goods to their place of destination, and there deliver them in a reasonable time and in a reasonable manner. (*Ibid.*) **H**

(4) Carrier not entitled to know contents

A carrier cannot refuse to carry a parcel on the ground that he is not informed of its contents. *Crouch v. Land N.W. Ry. Co.*, 14 C.B. 255. **I**

(5) Delivery to railway

- (a)—must be made according to the known course of its business. See *Sim. v. G.N. Ry. Co.*, 14 C.B. 647. **J**
- (b) Delivery must be made with the knowledge of the Railway Company, its agents or servants. *Lovett v. Hobbs*, 2 Show 147. **K**
- (c) Delivery should be made at a reasonable time. *Gaston v. B. & E. Ry. Co.*, 1 B. and S. 112. **L**

(6) Extraordinary precaution.

—need not be taken by a Railway Company against the act of God, there being no special contract. *Bridden v. G. N. Ry. Co.*, 28 L.J. Ex. 51. **M**

(7) Proper address to be given.

Goods, etc., must be properly addressed. See *Cal. Ry. Co. v. Hunter*, 20 Sess. Cas. (2nd Series) 1097, cited in Macnamara on Carriers, p. 136. **N**

(8) Obligation to carry.

The— is limited to such goods, and to and from such places as the Railway Company may have publicly professed to do, and has convenience for that purpose. *Johnson v. Mid. Ry. Co.*, 4 Ex. 67. **O**

(9) Duty of Railway Company as to method of carriage.

- (a) It is the duty of a Railway Company, on receiving goods at their station, to ascertain, in cases where several modes of carriage are open, by which of those modes the consignor wishes the goods to be conveyed. 94 P.R. 1883. **P**
- (b) A servant of the company employed to receive and forward goods has been held to have authority to contract to forward goods by a particular train, notwithstanding the instructions he may have received from the Company. *Anderson v. Chester and Holyhead Ry. Co.*, 4 I.C. 435. **Q**

2.—“Responsibility of Railway Administrations as carriers”—(Continued).**I.—GENERAL**—(Concluded).**{10} Route to be taken by the carrier.**

- (a) The carrier undertakes to carry by the route ordinarily adopted in the usual course of business, though that route may not be the shortest. *Hales v. L. and N.W. Ry. Co.*, 4 B. and S. 66. **Q1**
- (b) It is not necessary that a carrier should arrange to carry the goods by the shortest route. *Myer v. L. and S. W. Ry. Co.*, L.R. 5 C.P. 1. **R**

{11} Railway Company undertaking to carry goods by a named route.

On a—, such Company will be held responsible for any loss to which the consignor is put by their being carried by a different route. *Mallet v. G. E. Ry. Co.*, (1899) 1 Q.B. 309. **S**

{12} Customer of Company to know ordinary routes.

Every customer of a Company should be taken to know the ordinary routes and train arrangements according to which the Company professes to carry. 6 M L.T. 292; *Jobin v. London and N. W. Ry.*, 2 Trust Rep. 22 (35), F. **T**

{13} Obligation of warehousemen.

The obligation of the Company as warehousemen is to take proper care that the goods are safely kept from loss or injury. *Coggs v. Bernard*, 1 Sm. L.C. 188. **U**

{14} Warranty of safety of warehouse.

- (a) There is no warranty on the part of the warehousemen, that the place where the goods are kept are absolutely safe. *Searle v. Laverick*, L.R. 9 Q. B. 122. **V**
- (b) The obligation is only to provide a place reasonably safe. (*Ibid.*) **Y1**
- (c) If, therefore, a building has been erected by a competent contractor, and the warehouseman has no notice of any defect, he is not liable for injury to goods warehoused there, arising from the contractor's negligence. *Searle v. Laverick*, L.R. 9 Q.B. 122. **W**

{15} Goods at owners sole risk.

A notice to the consignee that goods have reached their destination and are held by the company not at carriers but at the owner's sole risk, subject to the usual warehouse charge, will not absolve the Company from the liability to take ordinary and reasonable care. *Mitchell v. Lancashire and Yorkshire Ry. Co.*, L.R. 10 Q.B. 256. **X**

II.—COMMON CARRIERS—LIABILITY AND NON-LIABILITY.**(1) Liability of common carriers.**

- (a) The—in India is discussed historically. See 6 P. R. 1897. **X1**
- (b) A common carrier is liable for losses by the wrongful acts of strangers, as well as those of his own servants, or arising from his own negligence. (See Story on Bailments, 507.) **Y**
- (c) (i) The only exceptions are losses by the act of God, that is, from natural accident which would not happen by the intervention of man. (See Story on Bailments, 511). **Z**
- (ii) The Act of God which would excuse the carrier must be immediate and not remote. *Smith v. Sheppard*, referred to in Abbot on Shipping, 11th Ed., pp. 338—339. **A**

2.—“Responsibility of Railway Administrations as carriers”—(Continued).

II.—COMMON CARRIERS—LIABILITY AND NON-LIABILITY—(Continued).

- (iii) And by public enemies that is, those with whom the nation is at war and not mere robbers. (*Ibid.*) B
- (d) But a carrier may limit his liability by means of special contracts or conditions. See *Wyld v. Pickford*, 8 M. and W. 443. C
- (e) If those are shown to have been brought to the knowledge of the consignor, and he does not dissent, he is by English law assumed to assent to them. (*Ibid.*) D
- (f) And this may be by a notice on ticket delivered to the consignor, or by exceptions contained in a bill of lading. (*Ibid.*) E
- (g) But inland carriers in India cannot limit their ordinary liability as to articles not enumerated in the Act by mere public notice. (See Act III of 1865, S. 6). F

(2) Liability of Railway attaches, when.

The liability of Railway Company only attaches from the time when the Railway Company accepts the goods for carriage: See *Dale v. Hall*, 1 Wills. 281. G

(3) Liability begins, when.

- (a) The liability begins on delivery to, and acceptance by the carrier; the delivery may be constructive as well as actual. See Story on Bailments, 574. H
- (b) Where the owner or his agent accompanies the goods and has exclusive custody of them, the carrier is not liable. *East India Co. v. Pullar*, 1 Stra. 99. I

(4) Liability ends, when.

- (a) The liability ends when the goods have arrived at their place of destination and are deposited there, and no further duty remains on the carrier. See *Shepherd v. B. & E. Ry. Co.*, L.R. 39 Ex. 189. J
- (b) The carrier will not be liable to the consignee, if, by the order of the consignee, the delivery is at a place different from that agreed upon with the consignor. *Bartlett v. L. & N.W. Ry. Co.*, 8 Jur. N. S. 58. K
- (c) The carrier's liability as carrier ceases when the contract for carriage has been performed. See Brown on Railway Companies, p. 299. L
- (d) If the goods are to be delivered at the consignee's address, and they are refused at that address, the liability as carrier ceases. *Hengh v. L. & N. W. Ry. Co.*, L.R. 5 Ex. 51. M

(5) Notice of refusal.

In such a case there is no general rule requiring the carrier to give notice of refusal to the consignor; the carrier is only bound to do what is reasonable under the circumstances. *Hudson v. Baxendale*, 27 L.J. Ex. 98. N

(6) Liability under a contract to carry.

- (a) Where a Company receives goods to be carried to a station beyond its own line, the contract is with that Company only, and that Company only can be sued by the owner of the goods if they are destroyed on the line of a second Company. *Muschamp v. Lancaster and Preston Ry. Co.*, 8 M. and W. 421. O

2.—“Responsibility of Railway Administrations as carriers”—(Continued).

II—COMMON CARRIERS—LIABILITY AND NON-LIABILITY—(Concluded).

(b) In such cases, a servant of another Company over which the goods are sent is to be considered the servant of the contracting Company for the purpose of taking instructions for the countermand of the delivery of parcels. The contracting Company is therefore liable if a servant of a second Company disobeys an order given to him by the owner of the goods. *Scotchman v. S. Staff Ry. Co.*, 8 A. X. 121. **P**

(7) Defect inherent—Liability of Railway Company.

(a) For any loss occurring through the inherent vice or defect of goods, a carrier will not be taken to task. *Hudson v. Bawendale*, 2 H. and N. 575. **Q**

(b) Loss from the inherent vice of the thing carried would include deterioration of perishable articles, and also evaporation and leakage of liquids. (*Ibid*) **R**

(8) “Fragile goods.”

(a) “Some goods require much more tender handling than others, and the line of conduct which the carrier should propose to himself is that which a prudent owner would adopt if he were in the carrier’s place, and had to deal with the goods or animals under the circumstances and subject to the conditions in which the carrier is placed, and under which he is called on to act” *Gill v. M. S. and L. Ry. Co.*, L. R. 8 Q.B. 186 (196). **S**

(b) If the consignor wants that some special care should be taken in carrying the animals or goods consigned, the Railway Company should be informed of the same. *Baldwin v. L. C. and S. Ry. Cos.*, L. R. 9 Q.B.D. 532 (584) **T**

(9) Goods left on Company’s premises without receipt—Liability for loss.

In the case of certain goods left on the premises of a Railway Company without a receipt being obtained therefor, *held*, that the Company was not liable for the loss of goods in that condition, because no receipt was obtained by the consignor as per the rules of the Company. 23 A. 367=21 A. W. N. 107 **U**

(10) Wagon defective—Liability of carriers.

(a) **ENGLISH LAW.**

According to the—, carriers being regarded as insurers of animals carried as well as of goods, they are liable for all loss or damages except when caused by the Act of God or the King’s enemies, although occasioned without any actual negligence on the part of the carriers. *Forward v. Pittard*. 1 R. R. 142. **Y**

(b) **INDIAN LAW.**

Semble :—A Railway Company will not be held liable, if it has taken such care as a man of ordinary prudence would take to see that the truck is sufficient for the purpose intended. **W**

(11) Non-liability as carriers.

Where goods have been lost after they had been marked by the railway authorities, but before they had been weighed or loaded, there was no complete contract for the carriage of the goods, but mere negotiation for the same, and the company was not therefore liable as carriers under S. 72 of the Act. 1 S. L. R. 77. **X**

2.—“Responsibility of Railway Administrations as carriers” —(Continued).

III.—DELIVERY OF GOODS.

(1) Notice of arrival of goods.

For provisions *re*—, see Rule 5 of the Rules for the warehousing and retention of goods under S. 47, *supra*. Y

(2) Goods to be ready for delivery.

(a) It is the duty of a Railway Company, in regard to the goods which have reached their destination, to have the same ready for delivery at the usual place of delivery, until, the consignee, in the exercise of due diligence, can call for and receive them. 3 B. 96. Z

(b) It is the owner's duty to call for and remove them within a reasonable time (*Ibid.*) A

(c) So, on proof of the arrival of the goods at the place of destination, the burden lies on the railway company to show that it has the goods ready for delivery for a reasonable time after such arrival, notwithstanding the fact that proof had not been given of any application for delivery by the plaintiff within a reasonable time. (*Ibid.*) B

(3) Goods to be examined by consignee while taking delivery.

(a) It is incumbent on a consignee to examine the goods delivered by a Railway Company at the proper place and at the proper time, and ascertain whether they are in good order or not. *Stewart v. N. B. Ry. Co.*, 5 Soss. Cas. (4th Series). 426. C

(b) If no objection is intimated by him the presumption will be that they were delivered in good order. (*Ibid.*) D

(4) Delivery of article.

(a) Where an article is delivered to a carrier, that article and everything in or upon it is delivered to him. *Walker v. Jackson*, 10 M. and W. 161. E

(b) It is the duty of the carrier to enquire what the article contains. (*Ibid.*) F

(5) Delivery of goods on the platform.

As to railways, the rule seems to be that its duty is to deliver on the platform if the consignee is present, or, if not present, then to keep the goods safely for a reasonable time. 2 Hillard, 382, 557. G

(6) Delivery within reasonable time.

(a) In the absence of a special contract, the carrier is bound to deliver the goods within a reasonable time. *Taylor v. G. N. Ry. Co.*, L. R. 1 C.P. 385. H

(b) He is not liable for delay caused by circumstances beyond his control, such as an accident due to the negligence of another company having running powers over the line. (*Ibid.*) I

(c) A contract to carry by a particular train which usually arrives at a certain hour, does not amount to a warranty that the train will so arrive, though the Company is informed that the object of the sender requires that it should so arrive. *Lord v. Midland Ry. Co.*, L. R. 2 C. P. 389. J

(7) Unreasonable delay.

(a) The mere fact that the goods have not arrived as usual, because the company had altered its time-tables without notice to the consignor, would be evidence of—. *Bollands v. Manchester, Sheffield and Lincolnshire Ry. Co.*, 15 Ir. C. L. 560. K

2.—“Responsibility of Railway Administrations as carriers.”—(Continued).

III —DELIVERY OF GOODS—(Continued).

(b) But the fact that a train arrives several hours after the proper time is *prima facie* evidence of unreasonable delay in carrying goods, and requires explanation from the Company. *Roberts v. Midland Ry. Co.*, 25 W.R. 323. L

(c) It is a question of fact for the jury whether, upon the whole circumstances of the case, there has been unreasonable delay. See *Browne on Railway Company*, 299. M

(d) If the ordinary course of conveyance is departed from owing to the negligence of a servant, this would be evidence of unreasonable delay. *Wern v. Eastern Ry. Co.*, 1 L. T. N. S. 5. N

(8) Delay—Effect.

(a) A railway Company will be liable if animals or goods are unduly delayed, through its negligence, to the damage of the owner or consignee. *Robinson v. G.W. Ry. Co.*, 35 L.J. C.P. 123. O

(t) But this responsibility does not attach to the railway Company, if the delay is due to causes over which it has no control, *e.g.*, an obstruction on the line caused by the act of God. See *Bridden v. G. N. Ry. Co.*, 28 L.J. Ex. 51. P

(9) Duty in case of absence, etc., of consignee.

(a) If the consignee is dead, cannot be found or refuses to receive the goods, the duty of the carrier is to secure the goods for the owner, and generally to do what is reasonable under the circumstances of the case. See *Story on Bailments* pp. 542, 544. Q

(b) There is no general rule of law requiring a carrier to give notice to the consignor, but in some cases it may be reasonable, and therefore necessary that the carrier should do so. (*Ibid.*) R

(10) Refusal of the consignee to take delivery of the goods.

(a) On the—, the carrier is not bound to inform the consignor of the same. *Hudson v. Nazendale*, 2 H. and N. 575. S

(b) Though in certain cases it may be reasonable to inform the consignor of the fact of such refusal. (*Ibid.*) T

(c) Where a consignee refuses to take delivery of the goods, the railway company, prior to the despatch of the goods to the consignor, will have to wait for a reasonable time. *G. W. Ry. Co. v. Crouch*, 3 H. and N. 183. U

(11) Consignee's refusal to pay carrier's charges—Detention of parcel.

Sample —Where a parcel is detained because the consignee refuses to pay the carrier's charges the parcel should be kept for a reasonable time at the place of delivery. *Crouch v. G. W. Ry. Co.* 27 L.J. Ex. 345. Y

(12) Time of delivery.

(a) Carriers, after a refusal of the goods at the consignee's address, are involuntary bailees, and are only bound to act with reasonable care and caution with respect to the goods. *Hengh v. L. and N. W. Ry. Co.*, L.R. 5 Exch. 51. W

2.—“Responsibility of Railway Administrations as carriers”—(Continued.)

III.—DELIVERY OF GOODS—(Continued).

- (b) Where there is no special contract as to the time of delivery, it must be within a reasonable time; but if the carrier has used ordinary diligence to prevent delay, there is no liability on the carrier's part for delay from accidents or causes beyond the control of such carrier. *Taylor v. G.N. Ry. Co.*, L.R.K. p. 385. **X**

(13) Amount of time allowed to the consignee to unload and remove his goods.

The —, and take delivery of the same depends on the circumstances of each case. *Coxon v. N.E. Ry. Co.*, (No. 2), 4 Ry. and Ca. Tr. Cas. 284. **Y**

(14) Place for delivery.

- (a) It is part of the duty of the carrier to provide a proper place for delivery. *Rooth v. N. E. Ry. Co.*, L.R. 2 Ex. 173. **Z**

- (b) And the carrier is liable to a loss arising from neglect to provide a proper place. (*Ibid.*) **A**

(15) Station-master, agent of Railway Company.

- (a) A station master is the agent of the railway Company for the delivery of goods. *Wright v. L. and N.W. Ry. Co.*, L.R. 10 Q.B. 298 (301). **B**

- (b) So, a station-master who assents to some other mode of delivery than the usual one, will bind the railway company thereby. (*Ibid.*) **C**

(16) Misdelivery.

- (a) A carrier is liable for—See Browne on Railway Company, p. 293. **D**

- (b) But a carrier is not liable if he acts in the usual course of business and in accordance with his instructions. (*Ibid.*) **E**

(17) Railway Company will be liable for misdelivery of goods.

- (a) A—*Stephenson v. Hart*, 29 R.R. 602. **F**

- (b) The action of a station-master who, without making enquiry of the consignor, delivers the goods to a wrong person, who had a name very similar to that of the real consignee, amounts to a wilful misconduct for which the railway company will be held liable. *Howie v. G.W. Ry. Co.*, 37 L.T. 186. **G**

(18) Railway Company, when not liable for misdelivery of goods.

- (a) Where a railway Company is forced to deliver the goods to a wrong person by reason of the directions of the consignor, it will not be held liable for misdelivery of goods. *Mc Kean v. Mc Ivor*, 40 L.J. Ex. 30. **H**

- (b) So also, when the railway Company delivers the goods through an insufficient address and without any fault on its part. *Cal. Ry. Co.*, v. *Hunter*, 20 Sess. Cas. (2nd series) 1097. **I**

- (c) So also, for a misdelivery through a forged order without negligence on the company's part. *Hengh v. L. and N.W. Ry. Co.*, L.R. 5 Ex. 51. **J**

(19) When non-delivery is excused.

- (a) The carrier is excused where there has been loss by the act of God, by public enemies, or by reason of inherent defects, or where from the nature of the goods they are liable to peculiar risks, and the carrier has taken all proper precautions against them, or where the right of stoppage in transit is duly exercised. See Story on Bailments 574—6. **K**

2.—“Responsibility of Railway Administrations as carriers”—(Continued).**III.—DELIVERY OF GOODS**—(Concluded).

- (b) Where the carrier by mistake advises the consignee that certain goods have arrived when they have not in fact arrived, the carrier is not estopped from explaining the mistake, and cannot be made liable for the non-delivery of the goods. *Carrv. L. and N.W. Ry. Co.*, L.R. 10 C P. 307. L

(20) Action for non-delivery of goods.

Action for non-delivery (owing to a carrier's negligence) is founded on contract and not on tort. *Fleming v. M. S. and L. Ry. Co.*, L.R. 4 Q B.D. 81. M

IV.—DAMAGES.**Damage for breach of contract to carry goods—Notice.**

- (a) The damages recoverable for breach of contract to carry goods, must be such as may be reasonably supposed to have been in the contemplation of the parties at the time they made the contract as the probable result of the breach of it. *Hoyne v. Midland Ry. Co.*, L.R. 8 C.P. 131 (137). N
- (b) Notice, that if the goods do not arrive in time they will be thrown upon owner's hands, is not such a notice of a lucrative contract by the owner as to enable him to recover his loss upon the contract. *Horne v. Midland Ry. Co.*, L.R. 8 C.P. 731. O
- (c) Labelling goods as “traveller's goods-deliver immediately” is not notice to the company of the purpose for which they are wanted, so as to enable the consignor to recover damages for the detention of a traveller. *Candy v. Midland Ry. Co.*, 38 L.T.N.S. 226 P

(2) When special damage can be recovered.

Where the object for which the goods are forwarded is expressly brought to the notice of the company, or can reasonably be inferred by it, it is liable for damages naturally resulting from failure of the object. *Simpson v. L. and N. W. Ry. Co.*, 1 Q.B.D. 274. Q

(3) Special damage when not recoverable.

- (a) Where goods are to be applied to a particular object not known to the company, damages which have arisen from failure of the object cannot be recovered. *Hadley v. Buxendale*, 9 Ex. 341. R
- (b) Where the Company undertakes to carry goods in waggons of a certain kind and the consignor does not deliver the goods to the company because the waggons are not provided, but sells them on the spot, he cannot recover the difference between the price at the place where they were sold and the place to which they were to have been carried, there being nothing to show that the goods might not have been sent on by other means. *Irvine v. Midland and Gt. W. Ry. (Ir.) Co.*, 6 L.R. Ir. 55. S

(4) Loss of contract.

Nor can the owner recover damages he suffers, by reason of the failure of a contract with a third person to whom he has sold his goods. *Horne v. Midland Ry. Co.*, L.R. 8 C.P. 131. T

(5) Hotel expenses.

Nor—, in waiting for the goods. *Woodyer v. G. W. Ry. Co.*, L.R. 2 C.P. 318. U

2.—“Responsibility of Railway Administrations as carriers” —(Continued).

IV.—DAMAGES—(Concluded).

(6) Personal expenses.

But he is entitled to his —in inquiring for the goods. *Hales v. L. and N.W. Ry. Co.*, 4 B. and S. 66. Y

(7) Action for loss of goods—Damages

(a) In an action for the loss of goods, the damages are, as a rule, the market value at the time and place where they ought to have been delivered. See Browne on *The Law of Railway Companies*, p. 301. W

(b) If there is no market value, the price at the place of manufacture must be taken as the measure, together with the cost of carriage and a reasonable sum for imported profit. *O Hanlan v. Gt. W. Ry. Co.*—34 L. J. Q. B. 154. X

(c) If this test does not apply, the value must be taken to be the price at which the owner has actually sold them under a contract. See *France v. Gandat*, L.R. 6 Q.B. 199. Y

(d) Or the price at which the best substitute for the goods could be supplied. *Hinde v. Liddell*, L.R. 10 Q.B. 265. Z

(e) It appears not to be clearly settled whether, where there has been delay in delivery, and the market price has fallen in the interval between the time when the goods ought to have been delivered and the time when they are delivered, the difference in price can be recovered. In the case of carriage by sea such damages cannot be recovered. *The Parana*, 1 P.D. 452. A

(f) On the other hand, in the case of land carriage, the authorities appear to show that damages for depreciation of market price can be recovered. *Wilson v. Lancashire and Yorkshire Ry. Co.*, 9 C.B.N. S. 63. B

(g) Where the Company enters into an independent contract with a carrier to carry goods which are lost, the company is not liable for the costs of an action to recover the goods brought by the owner against the carrier. *Furandale v. L.C. and D Ry. Co.*, L.R. 10 Ex. 5. C

V.—CONTRACT TO CARRY—SUIT TO BE BROUGHT AGAINST WHOM.

(1) Carrier contracts with owner of goods.

In the absence of special circumstances, the carrier's contract is with the person in whom the property in the goods is vested. See Browne on *Railway Company*, p. 296. D

(2) Who must sue under contract to carry.

(a) Thus, where goods are delivered to a carrier for a purchaser under a valid contract for sale the consignee is the proper person to sue whether he has nominated him or not. *Dutton v. Solomonson*, 3 B. and P. 582. E

(b) This general rule may be varied by a special contract by the carrier that he will be liable to the consignor. *Davis v. James*, 5 Burr. 2680. F

(c) If there is no valid contract between the consignor and consignee, the consignor is the person to sue, and the consignee cannot sue, though he may have appointed the carrier. *Combs v. Bristol and Exeter Ry. Co.* 3 H. and N. 510. G

(3) Goods sent on approval.

Where the goods are sent on approval, the consignor is the person to sue. *Swan v. Shepherd*, 1 M. and Rob. 223. H

2.—“Responsibility of Railway Administrations as carriers”—(Continued).

VI.—LIMITATION OF SUITS.

LIMITATION OF SUITS FOR LOSS OF, OR DAMAGE TO,
OR NON-DELIVERY OF GOODS.

1—Art. 30, Limitation Act (IX of 1908).

Description of suit.	Period of Limitation.	Time from which period begins to run.
Against a carrier for compensation for losing or injuring goods.	One year.	When the loss or injury occurs.

N.B.—The limitation was reduced from two years to one by Act X of 1899, S. 3, which came into force on the 1st May, 1899.

(1) Scope of article 30.

- (a) Art. 90 of Act XV of 1877 applies only to suits for compensation for loss of, or damage to goods arising from malfeasance, misfeasance or nonfeasance independent of contract 3 M. 107 (110) **I**
- (b) Act X of 1899 provides that “no suits shall be instituted against a common carrier for the loss of, or injury to, goods entrusted to him for carriage, unless the notice in writing of the loss of or injury has been given to him before the institution of suit, and within 6 months of the time when the loss or injury first came to the knowledge of the plaintiff.” **J**

(2) Suits for compensation for non-delivery of goods—*Onus probandi*.

- (a) (i) Where in a suit for compensation for non-delivery of goods entrusted to a carrier by railway, the defendant pleads limitation under Art. 30 of the Act of 1877, the burden of proving that the goods were lost lies on the defendant. 7 B. 478. **K**
- (ii) Mere non-delivery is no proof of loss (*Ibid.*) **L**
- (iii) If there be no such proof the suit will be governed by the Art. 49 or 115 of Act XV of 1877. (*Ibid.*) **M**
- (b) See 12 C. 477, which was a case of non-delivery of goods by a carrier and in which a decision similar to that in 7 B. 478 was arrived at. **N**
- (c) A contract made with a Railway Company for delivery of goods at a station on another line belonging to a different Company should be regarded as an entire contract made with the first Company alone, and not with that Company as the agent of the second Company, through whose stations the goods were to be sent. A suit against the latter Company, therefore, not being founded upon contract but based upon the alleged negligence on the part of such Company, would fall within the Limitation Act, Art. 30, Schedule II. 3 M. 240. **O**
- (d) But if the action were for non-delivery or short delivery of goods founded on a contract, Art. 115 and not Art. 30 of Act XV of 1877 will apply. (*Ibid.*) and 5 M. 388; 7 B. 478; 12 C. 477. **P**

2.—“Responsibility of Railway Administrations as carriers”—(Continued).

VI—LIMITATION OF SUITS—(Continued).

LIMITATION OF SUITS FOR LOSS OF, OR DAMAGE TO,
OR NON-DELIVERY OF GOODS—(Continued).

I.—Art. 30, Limitation Act (IX of 1908)—(Concluded).

(3) Loss of money.

- (a) A suit for compensation of money in *specie* despatched by rail, is governed by Art. 30, Act XV of 1877. 19 B. 165 (reversing 17 B. 723). **Q**
- (b) Where a box, containing rupees sent uninsured by a railway, was lost in the transit, a suit to recover the amount so lost was *held* governed by Art. 30 and not by Art. 115, Limitation Act. (*Ibid.*) **R**

(4) Date of loss—Burden of proof.

- (a) The mere fact of non-delivery of the goods on a certain date would not give rise to the presumption that the loss occurred on that date. 7 B. 478. **S**
- (b) To have the benefit of Art. 30 of Act XV of 1877 the carrier has to prove the actual date of the loss, provided the plaintiff has given *prima facie* evidence that his suit is not beyond the period of limitation prescribed, (*Ibid.*) **T**

II.—Art 31, Limitation Act (IX of 1908).

Description of suit.	Period of Limitation.	Time from which period begins to run.
Against a carrier for compensation for non-delivery of, or delay in delivering goods.	One year.	When the goods ought to be delivered.

N B—(1) The limitation was reduced from two years to one by Act X of 1899, S. 3, which came into force on the 1st May 1899.

N B.—(2) The words ‘non-delivery of’ introduced by Act X of 1899 have settled the controversy on the point. For conflict of opinions prior to 1899, see 3 M. 107 and 240, 5 M. 348, 7 B. 478, 19 B. 165 and 12 C. 477.

(1) Suit for non-delivery of goods.

Art. 115 is applicable to a suit against a railway Company by the consignee of goods (not sent on sample or for approval) for compensation for non-delivery, as the consignor contracts with the company as agent for the consignee and the property in the goods passes to the consignee on delivery to the Company. 5 M. 388. But see 4 Bom. L.R. 477. **U**

(2) Suits against railway Company for non-delivery of goods.

(a) CALCUTTA AND MADRAS HIGH COURTS, VIEW OF. **Y**

- (i) Suits against railway for non-delivery of goods is not regulated by Art. 31. **Y1**
- (ii) Following the decision of the Calcutta and the Madras High Courts, such suits must now be brought within one year from the date when the goods ought to have been delivered, provided there was no contract between the plaintiff and the Railway. **W**
- (iii) or, if there was such a contract, within 3 years under Art. 115. **X**

2.—“Responsibility of Railway Administrations as carriers”—(Continued).

VI.—LIMITATION ON SUITS—(Concluded).

LIMITATION OF SUITS FOR LOSS OF, OR DAMAGE TO, OR NON-DELIVERY OF GOODS—(Concluded).

II.—Art. 31, Limitation Act (IX of 1908)—(Concluded).

(b) BOMBAY VIEW.

A suit for damages for non-delivery of goods is governed by Art. 31 and not by Art. 115, Limitation Act., because such a case is specially provided by Art. 31. 26 B. 562=4 Bom L.R. 447. Y

N.B.—In the course of the judgment in the above case, *Fulton, J.* said—“We entirely agree in the reasoning of *Bayley, C.J.*, in 19 B 165, and hold that the Legislature having now re-enacted by Act X of 1899, Art 31 in a form rather more comprehensive than before, there can be no reason for not giving effect to what appears to be the manifest provisions of the law. Had this amendment been made at the time we think it probable that the difficulties felt by Justice *Farran* as to the effect of Art. 30 would not have arisen. It is clear that this is a suit against a carrier for compensation. Art. 31, therefore, applies and not Art. 115, which only applies to suits for compensation for breaches of contract not in writing registered and not specifically provided for in the Act.” Z

(c) PUNJAB VIEW.

(i) Art. 31 of Act XV of 1877 as amended by Act X of 1899 governs suits against a Railway Company for compensation for non delivery of goods whether the failure to deliver was tortious or was due to a breach of contract. 108 P.R. 1906 (F.B.)=2 P.L.R. (1907)=39 P.W.R. 1907. (19 B 165 and 26 B. 562, *F.*; 3 M. 107, 240; 12 C. 477, *diss.*). A

(ii) Art. 49 was held to be inapplicable as there was no wrongful conversion by the Railway Company, since the course which it adopted of selling the goods was one expressly authorised by the Railway Act, 1890. (*Ibid.*) B

VII.—STOPPAGE IN TRANSITU.

N.B.—For notes on—, see notes under S. 57, *supra*.

(1) Stoppage in transitu

An unpaid vendor has the right of stopping the goods as long as they are in transitu, in the event of the vendee's insolvency. See *Brown on Railway Companies*, p. 299. C

(2) Right lasts as long as carriage lasts.

(a) Where the goods are delivered to a carrier as such, the right of stoppage continues as long as the goods are in his possession as carrier, whether the carrier is nominated by the purchaser or not, and whether the destination of the goods is known by the vendor or not. *Ex parte Cooper, in re Maclaren*, 11 Ch.D. 68. D

(b) The fact that the goods are carried to their destination and there warehoused by the carrier or his agent, does not defeat the right of stoppage, if there is nothing to show that the carrier or his agent has become the agent of the purchaser, *Ex parte Barrow in re Worsdell*, 6 Ch. D. 783. E

2.—“^hResponsibility of Railway Administrations as carriers”—(Continued).

VII.—STOPPAGE IN TRANSITU—(Concluded)

(3) Purchaser refusing the goods when delivered.

Where the purchaser refuses the goods when delivered to him, the right of stoppage remains. *Bolton v. Lancashire & Yorkshire Ry. Co.*, L.R. 1 C.B. 431. F

(4) Where right of stoppage ceases.

The right of stoppage is gone when the transit prescribed by the vendor is at end, and the goods have been delivered to the purchaser or his agent whether they have reached their ultimate destination or not. See *Merchant Banking Co. of London v. Phoenix Bessemer Steel Co.*, 5 Ch. D. 205. G

(5) Transfer of property in goods.

(a) The right of stoppage over the goods is gone when the purchaser transferred the property in the goods to a *bona fide* purchaser for good consideration whether such consideration be past or not. *Leark v. Scott*, 2 Q.B.D. 376. H

(b) But if the original vendor gives a valid notice to stop during the transit, though after the sale of the goods to a sub-purchaser, he will be entitled to be paid out of the unpaid purchase-money payable by the sub-purchaser. *Ex parte Falk, in re Kiell*, 14 Ch. D. 445 I

VIII.—WANT OF AUTHORITY TO CONTRACT.

Want of authority to contract.

Where plaintiff's agent at T consigns goods to him at B, but before the consignment reaches B, plaintiff caused the goods clerk at H to telegraph to the station-master at B asking him to send on the consignment to H, which is not done and plaintiff sues for non-delivery of the goods at H, the plaintiff's proposal for the re-booking of the goods having been made to a wrong and unauthorised person (the goods clerk), the acceptance of it by the latter does not constitute a valid contract so as to bind the Ry. Co., and the plaintiff's suit based on such a contract must fail. 27 B. 126, 4 Bom. L.R. 890. *Garlon v. Great Western Ry. Co.*, (858), 27 L.J.Q.B. 375, R J

IX.—WANT OF PRIVACY OF CONTRACT.

(1) Contract—Want of privacy—Carrier—Two companies—Loss—Remedy.

Plaintiff delivered jute to the I.C.S.N. Company at Serajunge for the delivery at the E.B. Ry. Co's station at Sealdah, where freight was payable on delivery and was so paid. A portion of the jute was not delivered, and a suit to recover its value was brought against the E.B. Ry. Co. *Held*, that the suit could not be dismissed on the ground of want of privacy without further investigation. 17 W.R. 240. K

(2) Reference by Small Cause Court—S. 22, XI of 1865—Inferences of fact—Privacy of contract.

What a Small Cause Court is required to submit under S. 22, Act XI of 1865, is not, whether, upon the evidence sent, the Judge is right in the conclusion come to, but some question of law or construction affecting the merits. It was held that in this case the Judge was capable of inferring the absence of privacy of contract between the parties. 18 W. R. 145. L

2.—“Responsibility of Railway Administrations as carriers”—(Continued).

X.—JURISDICTION OF COURTS.

Breach of contract to deliver—Jurisdiction.

- (a) An action for breach of contract may be brought either in the place where the contract is made or in the place of its performance, and in either case the cause of action arises wholly. 1 M. 375. **M**
- (b) Plaintiffs contracted at Cawnpore with the E.I.Ry. Co. to deliver goods at Madras. The E.I.Ry. Co. does not run into the jurisdiction of the Madras High Court. On default made by the Railway Company in delivery of the goods, the plaintiffs sued them in the Madras High Court for damages for breach of contract without obtaining leave to sue. Held, that the breach having taken place at Madras, the cause of action had wholly arisen within the jurisdiction of the High Court. (*Ibid*) (10 B.L.R. 461; *Vaughan v. Weldon*, L.R. 10 C.P. 47, F.) **N**

XI.—PORT TRUST CHARGES.

Ss. 38, 69, Presidency Small Cause Courts Act—Re-hearing—Miscarriage or failure of justice—Case stated for the opinion of the High Court

Where a party prays for a case being stated to the High Court, but subsequently withdraws, and the judgment of the Court is finally against him, he ought not to be granted a re-hearing, unless there was miscarriage or failure of justice. An erroneous view of the law as to the fact of the case is not miscarriage or failure of justice. 17 B. 14. **O**

XII.—NEGLIGENCE

(1) Negligence.

- (a) —consists in the omitting to do something which a reasonable man would do, or in doing something that a reasonable man would not do, in either case unintentionally causing mischief to another. *Blyth v. The Birmingham Water Works Co.*, 25 L.J. Exch. 212, cited in 12 Bom L. R. 73 (84). **P**
- (b) “Negligence will not be a ground of legal liability unless the party whose conduct is in question is already in a situation that brings him under the duty of taking care. 12 Bom. L.R. 73 (84). **Q**
- (c) “The definition of negligence is the absence of care according to the circumstances.” *Per Willes, J., Vaughan v. Taff Vale Ry. Co.*, 5 H. and N. 679 (687). **R**
- (d) “The confusion seems to have arisen in using the word “negligence” as if it were an affirmative word, whereas, in truth, it is a negative word, it is the absence of such care, skill and diligence as it was the duty of the person to bring to the performance of the work which he is said not to have performed” *Per Willes, J., in Grill v. Gen Iron-Screw Colliery Co.*, L.R. 1 C. P. 600. **S**
- (e) Negligence depends on the circumstances of each case. *Ford v. L and S. W. Ry. Co.*, 2 F. and F. 730 (732). **T**
- (f) Negligence is a question of mixed law and fact. *Met. Ry. Co. v. Jackson*, L.R. 3 App. Cas. 193. **U**

2.—“Responsibility of Railway Administrations as carriers”—(Concluded).

XII.—NEGLIGENCE—(Concluded).

(g) “It is not, in many cases, practicable completely to sever the law from the facts.” (*Ibid.*) Y

(h) “The Judge has to say whether any facts have been established by evidence from which negligence may be reasonably inferred; the jurors have to say whether, from those facts when submitted to them, negligence ought to be inferred.” *Per Lord Cairns in (Ibid.)* W

(2) Negligence—Liability for injury.

A Railway Company is liable for injury sustained to goods committed to its care, if it has been guilty of gross negligence. *Bourke O. S. 39.* X

(3) Negligent conduct of railway servants.

Where, for want of bestowing due care, loss results, it is immaterial whether the negligence be imputable personally to the bailee or to his servants or agents. *Per Lord Campbell in Dansey v. Richardson, 3 E. and B. 144 (1866).* Y

(4) Person liable for the consequences of an accident, when.

A person may be liable for the consequences of an accident resulting from his own negligence in combination with other causes which he did not contemplate. *Lynch v. Nurdin, 1 Q. B. 29.* Z

XIII.—SENDING GOODS OF A DANGEROUS NATURE.

Railway Company not bound to examine every parcel.

(a) It is not the duty of a Railway Company to search every parcel which every passenger carries with him. 28 C. 401 (P.C.) = 28 I. A. 144 = 5 C. W. N. 449. A

(b) It is the duty of a railway company to prevent dangerous looking goods being carried. (*Ibid.*)

N.B.—See also notes under S. 59, *supra*, and S. 107, *infra*. B

72. (1) The responsibility of a railway administration for the loss,

Measure of the general responsibility of a railway administration as a carrier of animals and goods.

destruction¹ or deterioration² of animals or goods³ delivered⁴ to the administration to be carried by railway⁵ shall, subject to the other provisions of this Act, be that of a bailee under sections 152, and 161 of the Indian Contract Act, 1872⁶.

(2)⁷ An agreement purporting to limit that responsibility⁸ shall, in so far as it purports to effect such limitation, be void, unless it—

• (a) is in writing signed⁹ by or on behalf of the person sending or delivering to the railway administration the animals or goods, and

(b) is otherwise in a form approved by the Governor-General in Council.

(3) Nothing in the Common Law of England or in the Carriers Act, 1865, regarding the responsibility of common carriers with respect to the carriage of animals or 'goods, shall affect the responsibility as in this section defined of a railway administration.

(Old Acts).

Act IV of 1879....S. 10.

Act XVIII of 1864....S. 11.

(Notes).

General.

(1) **Liability under Act IV of 1879, S. 10.**

(a) The intention of the Legislature in enacting S. 10, Act IV of 1879, would appear to have been to define the liability of carriers by railway as identical with that of bailees in S. 152 and S. 161 of the Contract Act. 97 P.R. 1886. C

(b) Under the enactment contained in S. 10, Act IV of 1879 (S. 72, Present Act), a carrier by railway is not subject to the common law liability of common carriers. (*Ibid.*) D

(c) After the passing of the Railway Act of 1879, the liability of carriers in India, including carriers by Railway, was held to be not limited to a liability for negligence, but was held to be a liability as insurers of the goods delivered to them. 18 C. 427 (442). E

(2) **Liability under Railway Act, 1890.**

(a) The Railway Act of 1890 reduces the responsibility of carriers by railway to that of a bailee under S. 152, Contract Act, but this does not affect the law relating to common carriers as such, laying down this liability as insurers on non-delivery. 18 C. 620 (P.C.) = 18 I.A. 121. F

(b) Apart from any special contract, the responsibility of a Railway Company for the loss, or deterioration of goods is declared by S. 72 of the Act to be that of a bailee, as defined in Ss. 151, 152 and 161, Contract Act. 8 M.L.J. 85 (89). G

(c) The liability of a Railway Company for loss of goods delivered to be carried by them is, subject to the Provisions of the Act, that of a bailee under the Indian Contract Act. The plaintiff need not prove how the loss was caused; he must only show, in the first instance, the alleged loss or deficiency, and then, in the absence of proof by the company of any special grounds for exemption, the latter will be liable as bailees. 17 M. 445, H

(d) It is for the Company to show that the loss occurred under circumstances which would exempt a bailee from responsibility. (*Ibid.*) I

(3) **Object of section—Injury caused by gross negligence not within section.**

(a) Under the common law, a carrier might, by special contract, protect himself even against loss or injury occasioned by the gross negligence of himself, or his agents. *Austin v. The Manchester Sheffield and Lincolnshire Ry. Co.*, 16 Q.B. 30; *Chippendale v. The Lancashire and Yorkshire Ry. Co.*, 21 L.J.Q.B. 22 and 3 B. 96 (105); *Peak v. North Staffordshire Railway Company*, 10 H.L.C. 473, J

General—(Concluded).

- (b) The object of S. 11, Act XVIII of 1854 (*Cf.* present section), therefore, appears to have been to fetter Railway Companies thus far in their power of contracting as to preclude them from being able by any stipulation to escape from liability for loss or injury to goods caused by gross negligence or misconduct of their agents or servants. **K**
3 B. 96.

(4) Provisions of this section.

- (a) The——are quite clear and free from all ambiguity, and it is not open to any Court to take a case out of the provisions of the Statute when the case clearly falls within those provisions. 18 A 42. **L**
- (b) The——are not fulfilled by the sender merely giving an account of the quantity and description of the goods delivered for carriage when required to do so by the booking clerk. 5 M 208. **M**

(5) Scope of section

This section embodies the general common law with regard to the responsibility of carriers, which is that, when goods are delivered to the Railway to be carried, they become liable under the law like any other bailee. 31 C 951 = 8 C.W.N. 725 **N**

(6) Common Law of England.

The Common Law, which came to govern the duties and liabilities of common carrier throughout India, was the——. (See 18 C 620) The effect of that law, as regards railways, is restricted by this section. 17 B. 417. **O**

(7) Injury caused by gross negligence, not within section.

Under this section, notwithstanding any contract, or notice, the Railway Company shall always be liable for any loss caused by gross negligence or misconduct. In effect, it restrains the Company from limiting their liability with regard to ordinary goods, beyond gross negligence and misconduct, they, however, may with the consent of the Government, limit their liability for their loss arising from other reasons than gross neglect. *Per Peacock, C J.* in 4 B.L.R. 97 (O.C.) **P**

(8) Ss. 72 and 80

—— referred to, in the judgment in 15 C.P.L.R. 116. **Q**

I.—“Loss, destruction.”**(1) “Loss, destruction,” scope of the expression.**

The words “loss, destruction” etc., in S. 75, *infra*, include loss caused by the criminal misappropriation of the parcel by a servant of the railway administration in charge thereof. 19 B. 159. **R**

(2) ‘Loss or injury’ in Sec. 1, English Carriers Act, 1830.

The words—— have been held to include the following:—

- (a) A loss of season or market, *Wilson v. L. and Y. Ry. Co.*, 9 C.B. (N.S.) 682 (cited in 21 M. 172). **S**
- (b) A loss that occurs when goods have been negligently taken beyond their place of destination. *Morritt v. N. E. Ry. Co.*, 45 L. J. Q. B. 289, (Referred to in 7 B. 478). **T**

1.—“*Loss, destruction*”—(Concluded).

- (c) A temporary loss resulting from misdelivery. *Millen v. Braschi*, 10 Q. B. D. 142 (referred to in 7 B. 478). U
- (d) Loss must be a loss by the carrier and not simply a loss by the owner in consequence of the non-delivery or the article in due time. *Hearn v. L. and S. W. Ry. Co.*, 10 Ex. 793, (Referred to in 19 B. 159). Y

2.—“*Deterioration.*”(1) ‘*Deterioration,*’ meaning of.

- (a) The word ‘deterioration’ imports the becoming reduced either in quality or in value (see the Standard Dictionary). *Per Subramanyya Aiyar, J.* 21 M. 172 (175). W
- (b) Deterioration must be such as is caused by the default of railway. (*Ibid.*) X
- (c) The word deterioration is wide enough to cover a falling off in the value of the goods due to their not having been delivered in time to enable the plaintiff to take advantage of the special market value which would have been available during a certain festival at a certain place. 8 M. 1. J 85 (89). Y
- (d) The plaintiff, a cap manufacturer, sued the defendants for damages caused by the improper delay in delivering some cloth. The plaintiff had bought the article with a view to make it into caps for sale during the spring season of the year, but owing to the delay in transit, the plaintiff was unable to sell or use any part of it or manufacture any part of it into caps for sale in that season. Referring to the fall in the value of the cloth that could be shown to have taken place in consequence of the same arriving at a time when it was less in demand and less capable of being applied to an immediate use, *Williams, Willes and Keating, JJ.*, spoke of it as “deterioration,” and those learned Judges as well as Byles, J., held that, in respect of such fall the same being the direct and natural result of the delay, the carrier was liable even in the absence of notice of the purpose for which the article was sent. *Wilson v. Lancashire and Yorkshire Ry. Co.*, 30 L.J.C P. 232 (cited in 21 M. 172, 175, 176) Z
- (e) Damage to cattle carried by the negligent conduct of the railway company in not supplying water, would probably be included in the term “deterioration.” *Allday v. G. W. Ry. Co.*, 5 L. and S. 903. A
- (f) The term does not refer to damage due to their inherent vice. *Kendall v. L. and S. W. Ry. Co.*, L. R. 7 Ex. 373. B
- (g) Where a bullock is killed while attempting to escape from a truck, the railway company is not liable. *Blower v. G. W. Ry. Co.*, L.R. 7 C. P. 655. C
- (h) So also when damage to goods is due to their ordinary wear and tear. *Wilson v. L. and Y. R. Ry. Co.*, 9 C. B. (N. S.), 632. D

(2) *Case of destruction or deterioration of goods.*

- (a) Where it is a case of destruction or deterioration of goods bailed, the question of *onus* depends on the nature of the accident. 22 A. 164 (167). E

2.—“*Deterioration*”—(Concluded).

- (b) If it is one which, in the ordinary course of events, would not happen to goods of the kind in question if used with ordinary prudence, then it lies on the bailee to account for its occurrence, and thus to show that it was not due to his negligence. (*Ibid.*) F
- (c) Otherwise, it is for the bailor to give some evidence of negligence. (*Ibid.*) G

3.—“*Goods.*”**Applicability of the section.**

This section is applicable to the luggage of a passenger, whether in charge of the passenger or of the railway servant, if it has been booked and receipt given for the same as required by S. 74, *infra*. 56 P R 1897. H

4.—“*Delivered.*”**‘Delivered’ scope of the term.**

The word delivered in this section, refers to a physical event, an important element of which is, that whatever is delivered passes from the physical custody of one man to the physical custody of another. It is devoid of any legal significance. 31 C. 951 = 8 C.W.W. 725. I

5.—“*To be carried by the railway.*”**(1) Applicability of section.**

- (a) This section applies only to cases in which animals or goods are delivered to be carried by railway. J
- (b) Hence the provisions of the Contract Act as to bailments generally apply to cases in which animals or goods are received by a railway company as warehousemen, or in a similar capacity. K
- (c) And such provisions can be modified by special contract. L

(2) Responsibility of carrier ceases, when—English Law.

- (a) Under the English Law, if the consignor of animals or goods had, or by watchfulness might have had, an opportunity of removing them, the responsibility as carriers comes to an end. *Shepherd v. Bristol and Exeter Ry Co.*, 3 Ex. 189. M
- (b) If the servant of the consignee being unable to drive away cattle, has them put into pens by the company's servants, the company's liability as carriers is, it seems, then at an end. (*Ibid.*) N

6.—“*That of bailee....1872.*”**“Railway administration, responsibility of, as bailee under Contract Act.**

The English common law rule, under which common carriers are held liable as insurers of goods against all risks except the act of God or the King's enemies, is not now in force in India. In cases not met by the special provisions of the Act relating to railways and carriers, the liability of carriers for loss or damage to goods entrusted to them is prescribed by Ss. 151 and 152 of the Contract Act. 3 B. 109 (dissented from in 10 C. 166; 10 C. 210; 18 C. 427, 620 (P.C.)). O

6.—“That of bailee....1872”—(Concluded).

(2) Ordinary liability of Company under S. 152 of the Contract Act—Theft of goods on railway.

In the absence of special provisions in Act^s relating to Railways and Carriers, the liability of Carriers is that prescribed by S. 152 of the Contract Act. So, where goods consigned to the Company were plundered by robbers during the journey, the Company was permitted to prove that the robbers were not the Company's servants or agents, and that they had taken reasonable care of the goods. 3 B. 109 (419). P

(3) Care to be taken by bailee.

In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. S. 151, Indian Contract Act (IX of 1872). Q

(4) Bailee when not liable for loss, etc., of thing bailed.

The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the ordinary care of it described in S. 151. (S. 152, Indian Contract Act, IX of 1872). R

(5) Bailee's responsibility, when goods are not duly returned.

If, by fault of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time. (S. 161, Contract Act) S

(6) Degree of care required.

The—is not that which the bailee as a fact exercises over his own goods similarly situated with goods bailed to him. See 11 M. 459 (466). T

(7) Degree of care required by a carrier.

(a) As to—, see 26 C. 398 (P.C.) = 26 I.A. 1 = 3 C.W.N. 145. See, also, 22 A. 361 ; 9 A. 398, 17 B. 723. U

(i) On the appellants failing to account for the loss of a large amount of coal entrusted to them, *held*, that they were liable. 22 M. 524. Y

(c) (i) “The Court has, in dealing with cases under S. 151, Contract Act, to determine what a man of ordinary prudence would have done with his own goods under the circumstances.” See, Indian Contract Act, by *Cunningham and Shepherd*, 8th Ed., p. 338. W

(ii) “It must, therefore, take into consideration, the state of society, the ways of life, and the danger peculiar to the times, as well as the apparent nature of the subject of the bailment, and the degree of care which it seems to require.” (*Ibid.*) X

(8) Loss—Onus.

If goods bailed have been lost, it lies on the bailees to show that they have taken as much care of the goods as a man of ordinary prudence would, under similar circumstances, have taken of his own goods of a similar kind, and that the loss occurred notwithstanding such care. If the bailee fails to satisfy the Court on this point he is liable for the loss. 22 M. 524. Y

7.—“Sub-section (2).”

(1) “Risk-notes.”

- (a) ———are agreements made in pursuance of sub-S. (2) of this section. **Z**
- (b) Formerly the public felt it difficult to know what forms of “risk notes” had been approved by the Governor-General as required by cl. (b) of sub-S. (2) of the section. **A**
- (c) But now this difficulty has been removed since forms of “risk notes” duly approved by the Governor-General have been sanctioned by Government of India Notifications, No. 118, dated 16th March, 1898, and No. 115, dated 21st March 1900. **B**

(2) Risk-note forms.

For—, prescribed under this section, see circular No. 1, Railway, 9th March, 1898, and circular No. VII, Railway, 12th March 1900, and circular No. VII, 23rd Dec 1902. **C**

RISK-NOTES APPROVED BY THE GOVERNOR-GENERAL IN COUNCIL
UNDER S. 72 (2) (b) USED FOR WHAT PURPOSE.

N.B.—For the various forms of ‘Risk Notes’ approved under this section. See Appendix)

(1) Risk-note Form A.

When used.

This form is to be used when articles are tendered for carriage which are either already in bad condition or so defectively packed as to be liable to damage, leakage, or wastage in transit. See, Circular No. I, Railway, 9th March, 1898. **D**

(2) Risk-note, Form B.

When used

This form is to be used when the sender elects to despatch, at “special reduced” or “owner’s risk” rate, articles or animals for which an alternative “ordinary” or “risk acceptance” rate is quoted in the tariff. (*Ibid.*) **E**

(3) Risk-note, Form C.

When used.

This form is to be used when, at sender’s request, open waggons, carts or boats are used for the conveyance of goods liable to damage when so carried, and which, under other circumstances, would be carried in covered waggons, carts or boats. (*Ibid.*) **F**

(4) Risk-note, Form D.

When used

This form is to be used when the sender elects to despatch, at “special reduced” or “owner’s risk” rate, dangerous, explosive, or combustible articles for which an alternative “ordinary” or “risk acceptance” rate is quoted in the tariff. (*Ibid.*) **G**

(5) Risk-note, Form E.

When used.

This form is to be used, when booking elephants or horses of a declared value exceeding Rs. 500 a head; mules, camels, for horned cattle Rs. 50 a head; donkeys, sheep, goats, dogs or other animals Rs. 10 a head, without payment of the percentage on value authorised in S. 73, Act IX of 1890 (as amended by S. 4, Act IX of 1896). (*Ibid.*) **H**

7.—“Sub-section (2)”—(Continued).

(6) Risk-note, Form F.

When used.

This form is to be used when booking horses, mules and ponies, tendered for despatch in cattle trucks or horse waggons instead of the horse boxes. (*Ibid*) I

(7) Risk-note, Form G.

When used.

This form is to be used as an alternative to Risk-Note, Form D, in the case of dangerous, explosive or combustible articles, for which an alternative “ordinary” or “risk acceptance” rate is quoted in the tariff, when the sender desires to enter into a general agreement instead of executing a separate risk-note for each consignment. (See Circular No. VII, Railway, 23rd Dec. 1902) J

(8) Risk-note, Form H

When used.

This form is to be used as an alternative to Risk note, Form B, when a sender desires to enter into a general agreement instead of executing a separate risk-note for each consignment. (See Circular No. I, Railway, 12th March 1898). K

(9) Risk-note, Form X.

When used

This form is to be used when the sender elects to despatch an “excepted” article or articles specified in Sch. II of this Act, whose value exceeds Rs 100 without payment of the percentage on value authorised in S. 75 of the Act. (*Ibid*) L

(10) Risk-note, Form Y.

When used.

This form is to be used as an alternative to Risk-note, Form X, when the sender elects to enter into a general agreement for a term not exceeding six months for the despatch of “excepted” articles specified in Sch. II of the Act, when value exceeds Rs. 100 without payment of the percentage on value authorised in S. 75 of the Act instead of executing a separate risk-note for each consignment. (See Circular No. VII, Railway, 12th March 1900) M

(3) Risk-note, validity of contract under

The risk-note is a document ordinarily purporting to limit the responsibility of the Railway Company for the loss or damage to goods delivered to them for being carried by railway, and whenever it is in writing, signed by the person sending the goods, and is in the form approved by the Government, there is nothing to prevent its amounting to a legally valid contract under S. 72 of the Act. 18 A. 42, *distinguishing* 3 N.W.P. 200. N

7.—“Sub-section (2)”—(Continued).

(4) Railway Company—Risk-note.

Where the plaintiff consigned goods through a Railway Company and they were damaged at a station beyond the one for which they were consigned, the company not being guilty of negligence, *held*, that the company was protected under the risk-note, the words “before, during and after transit” occurring therein covering the whole period from the time of delivery to the company up to re-delivery by it. 6 M.L.T. 292; *Steat v. Fagg*, 4 R.R. 407, D. O

(5) Exemption from liability.

- (a) Where, by the risk-note, the consignor, in consideration of a special reduced rate instead of the ordinary tariff rate for goods, undertook to hold the company free from liability for any loss or damage to the goods consigned arising from any cause whatever, the company could claim protection under the terms of such risk-note. 17 B. 417. P
- (b) Except so far as the company has been protected by the terms of the risk-note, it continues liable for the safe carriage of the goods, and the risk-note does not absolve it from all liability so as to impose on the plaintiff the burden of proving that the loss was caused by such defaults as render the company liable. 3 N.W.P. 200. Q

(6) Special contract under risk-note, effect of, on liability of Railway Company.

Where the risk-note signed by the consignor and embodying the special contract to hold the Railway Company harmless, was in the form approved by the Governor-General in Council, the company would not be liable to account to the consignee for any loss from any cause whatever, during the whole of the time that the goods were in their charge. 10 C. 210 (213). R

(7) Risk note by consignor—Liability of Railway administrator *re* goods lost in transit.

Twenty bundles of loose cotton were consigned by a firm at C to the plaintiff's firm at G. A risk-note in a form approved by the Governor-General in Council under S. 72 (2) (b) of this Act was signed on behalf of the consignors at the time when the goods were delivered to the Railway. The risk note provided that, whereas the consignment of cotton was charged at a special reduced rate chargeable for such consignment, the consignors in consideration of such lower charge undertook to hold the railway administration harmless and free from all responsibility for any loss, destruction or deterioration of, or, damage to the consignment from any cause whatever. A part of the consignment was lost in transit. The plaintiffs sued the Railway administrator for damages. *Held*, that part of the consignment was “lost” within the meaning of the risk-note, though the cause of the loss was not proved; and that the railway administration was protected by the risk-note. 5 O.C. 158; (17 B. 417; 8 A. 42, R.). S

(8) Railway Company—Liability as carriers—Risk-note, Form B.

Where the plaintiff company delivered 188 bags of flour to be carried from Delhi to Secunderabad by the defendant Railway Company, and

7.—“Sub-section (2)”—(Continued).

executed a written agreement with the defendant company in the form of risk-note B under S. 72 (2) of the Act, paying a reduced rate for the conveyance, and also with the knowledge of their accredited agent that the bags were conveyed in open waggons, it was *held* that an agreement in Form B relieves the Railway Company from liability in respect of any claim for compensation, no matter how the loss, destruction, deterioration, or damage was caused, and the mere fact that such loss, etc., was due to the goods being negligently loaded in open waggons does not affect the question. 113 P.R. 1908 = 15 P.L.R. 1909; (10 C. 210; 30 C. 257; 17 B. 417; 19 B. 159; 18 A. 42; 14 M.L.J. 396, R.) T

(9) Effect of “risk-note, Form B”—Loss of goods—Liability of Railway Company—S. 152, Contract.

Where a special agreement, otherwise known as “Risk-note, Form B” sanctioned by the Governor-General in Council under S. 72 (2) of the Act, was given by a consignor of goods to a Railway Company, *held*, that the Company was exempt from all liability for loss occasioned by any cause whatsoever; the reason being, that the company is not, in such cases, a bailee within the meaning of S. 152, Indian Contract Act (IX of 1872). 30 C. 257 = 7 C.W.N. 370; 10 C. 210, 18 A. 42; 17 B. 417; 19 B. 159, *rel. on*; *Foll. in* 2 N.L.R. 125. U

(10) “Risk-note”—Goods lost in transit.

In a case in which goods are carried by a Railway Company under the terms of a “risk-note” by which the Railway Company is not liable for any loss, destruction or deterioration of, or damage to the goods before, during, or after transit, *held*, that the Railway Company is not liable for failure to deliver the goods if they are lost in transit. 14 M.L.J. 396. V

(11) “At owner’s risk or solely at owner’s risk. scope and nature of the expression.

(a) The words “at owner’s risk” or “solely at owner’s risk” do not by themselves confer a right to immunity where goods have been lost or damaged in the course of the carriage, and where the mischief has arisen solely or in part through the negligence of the carrier or his servants. Per *Kennedy, J.* in *Air Schel and Mayor v. G. Eastern Railway*, 96 L. T. R., p. 151, *cited in* 3 P.W.R. 658. W

(b) This decision is not in conflict with the Indian authorities, for the learned Judge concedes that, when a person requests the carrier to carry goods at reduced rates in consideration of his holding the carrier free from liability for any loss or damage, he is bound by such agreement. (*Ibid*). X

(12) Suit for damages against company for acts of their servants amounting to gross negligence—“Risk-note,” effect of.

Plaintiff sued a Ry. Co. for damages for loss and deterioration resulting from a misdelivery, by one of the Company’s servants, of a consignment of wool. The company set up in answer a special contract, which the plaintiff’s consignor entered into with the Company and which was embodied in a “Risk-note”, by which the consignor, in consideration of having the wool carried at a rate below the ordinary tariff rate, agreed to hold the company “harmless and free from all responsibility

7.—“Sub-section (2)”—(Concluded).

for any loss or damage to the consignment. Held, that the “Risk note” constituted an agreement, conforming in every respect to the requirements of S. 72 (2) of the Act, and its terms leave no alternative but to hold, that, as the effect of the “Risk-note,” in no case would the Ry. Co. be liable to account to the consignee for any loss from any cause whatever. 2 N.L.R. 125; (17 B. 417; 19 B. 159; 18 A. 42; 30 C. 257, F.). Y

8.—“That responsibility.”

“That responsibility,” construction of the expression.

The expression ‘that responsibility’ in Sub-S. (2) refers to the responsibility for the ‘loss, destruction or deterioration’ specified in Sub-S. (1) of this section. See 21 M. 172. Z

9 —“In writing signed.”

(1) “Risk-note”—Signature.

Where a carrier who did the carting and was employed as agent by both parties signed the risk-note, held, that the signature of such a person was sufficient. *Aldridge v. G. W. Ry. Co.*, 15 C.B. (N.S.) 582. A

(2) Contracts for carriage, when valid under, Railway and Canal Traffic Act, 1854.

By “the Railway and Canal Traffic Act, 1854,” no special contract between any railway or canal company and any other party respecting the receiving, forwarding, or delivering of any animals, articles or goods, or things, shall be binding upon or affect any such party, unless it be just and reasonable and signed by such party, or by the person delivering such things for carriage. See *Wise v. Gt. West. Rail Co.*, 1856 25 L.J. Ex. 258, *Simons v. Gt. West. Rail Co.*, 1857, 26 L.J.C.P. 25; *London and N. West. Rail Co. v. Durham*, 1856 18 C.B. 826; *Beal v. S. Devon Rail Co.*, 1864, 29 L.J. Ex. 441. B

(3) Signing contract after injury done.

The Railway Company will not be held liable, in a case in which a horse is injured in an attempt to place it in a horse-box, and the groom, after the receiving of the injuries, signs a contract for the carriage of the horse at a reduced rate at “owner’s risk.” *Kirby v. G. W. Ry. Co.*, 18 L.T. 658 C

Miscellaneous.

(1) Duty of railway servants.

The duty of the servants of the Railway Company does not extend to an enquiry into the ownership of the articles which a passenger seeks to have conveyed with him. 128 P.L.R. 1903 = 25 P.R. 1903 (Cr.). D

(2) Duty to keep goods ready for delivery, burden of proof.

It is the duty of a Railway Company, in regard to the luggage of a passenger which has reached its destination, to have the luggage ready for delivery at the usual place until the owner, whose duty it is to call for and remove it within a reasonable time, does so. In such case, the burden lies on the company to show that they had kept the goods ready for delivery for a reasonable time after their arrival. 3 B. 96 (107), following *Patscheider v. Great Western Railway Company*, L.R. 3 Ex. Div. 153. E

Miscellaneous—(Continued).**(3) Attempt to defraud Railway Company.**

The accused entrusted some of his luggage at a railway station to a railway passenger who paid his full fare and also for the luggage in excess of what was allowed by the rules. For this he was convicted of attempting to defraud the Railway Company under bye-law 8 (that bye-law providing that every person attempting to defraud the Railway Company by, in any manner, endeavouring to evade payment of his full fare, is liable to a fine of Rs. 100) of the Railway Company. *Held*, that the conviction was illegal. 128 P.L.R. 1903=25 P. R. 1903(Cr.) F

(4) Railway receipts—Short delivery—Estoppel—Liability of Railway Company.

A Railway Company accepting consignment of goods for delivery at a particular place and issuing receipt for the same, is liable for short delivery at that place, either because the Railway Company is estopped from pleading non-receipt of the goods against one who has acted in accordance with custom on the railway receipt and paid for the goods, or because the receipt is *prima facie* proof of the goods delivered and there is no proof that the receipt mis-stated the goods delivered. 3 Bom. L. R. 260. G

(5) Consignor's agent changing condition in which consignment was originally agreed to be sent—Consignee ignorant of change—Refusal to take delivery.

Plaintiff's agent consigned goods—coconuts—in bags to plaintiff's address, and afterwards received the bags and loaded them loose in a waggon. The description in the railway receipt and label on the waggon as "bags" was not changed. The consignee refused to take delivery otherwise than in bags, and filed a suit against the Railway Company for damages for non-delivery, *held*, that the contract of the company being with the plaintiff's agent and not with the plaintiff, his right of suit, if any, was against the agent who had himself modified the contract by his action and not against the Company. 5 Bom. L. R. 958 H

(6) Consignment under receipt note not signed by consignor.

The fact that the consignor had not signed the receipt note for the goods was held immaterial, because he had actually delivered the goods under the terms of such note and could not claim exemption from any of the terms. 99 P. R. 1895. I

(7) Consignee's delay in taking delivery.

Where a large quantity of goods of the same description are delivered to a carrier, his responsibility as such will continue, until the whole are ready for delivery, and, during the delay in the removal of the goods, he is liable as a warehouseman. 92 P.R. 1883. J

(8) Suit for value of goods consigned.

Suit against a Railway Company for the value of goods consigned to plaintiff, which defendants had received for delivery to plaintiff, according to a railway receipt, but which they had delivered to T. & Co.; *held* that the handing over by consignors of the railway receipt to plaintiff passed the right of possession and property to plaintiff who had a substantial interest in the consignment, and that the authority given to him by

Miscellaneous—(Concluded).

the consignor was coupled with an interest which neither they nor defendants could revoke; and as defendants had no notice of T. & Co.'s equitable title, they were not justified in delivering to him, and were liable for the wrongful delivery. 17 W.R. 532. **K**

(9) Passenger's luggage—Merchandise booked as luggage, loss of—Suit for damages.

A passenger took a journey on a railway and booked as his "luggage" a package containing merchandise. The package was lost and consequently not delivered at the end of his journey. He, thereupon, sued the Railway Company for damages caused by its loss. *Held*, that the case was governed by S. 72 of the Act and the section of the Contract Act referred to therein; and that the Railway Company was liable for the loss of the package. 86 C. 819. **L**

(10) Certain agreement with Railway Company exempt from stamp duty.

(a) Agreement made with a Railway Company or administration for the conveyance of goods. (See Gazette of India, 18th Feb. 1899, Pt. I, p. 79.) **M**

(b) Agreement or indemnity bond given to a railway authority by a passenger permitted to travel without payment of fare, indemnifying such authority from any claim for damages in case of accident or injury. (*Ibid.*) **N**

(c) Agreement or indemnity bond given to a railway authority by a consignee, when the railway receipt is not produced in respect of the delivery of articles carried at half parcel rates or at goods-rates, namely, fresh fish, fruits, vegetables, bazaar baskets, bread, meat, ice, and other perishable articles. (*Ibid.*) **O**

(d) Agreement made with a Railway Company or administration, which purports to limit the responsibility of the company or administration as declared by the Indian Railways Act, S. 72, Sub-S. (1), and is in a form approved by the Governor-General in Council under Sub-section (2) of that section. (*Ibid.*) **P**

(e) Receipt given by a Railway Company or administration for the fare for the conveyance of passenger or goods, or both, or animals, or given to such company or administration for the refund of an overcharge made in respect of such fare. (*Ibid.*) **Q**

(f) Debenture bond of the loan of Rs. 20,00,000 raised by the Government of His Highness the Maharaja of Mysore for the construction of a line of railway from Bangalore to Tiptoor, where the said bond is negotiated in British India. (*Ibid.*) **R**

73. (1) The responsibility of a railway administration under

Further provision with respect to the liability of a railway administration as carrier of animals.

the last foregoing section for the loss, destruction, or deterioration of animals¹ delivered to the administration to be carried on a railway shall not, in any case, exceed, in the case of elephants or horses, five hundred rupees a head, or, in the case of mules², camels or horned cattle, fifty rupees a head, or, in the case of

donkeys ², sheep, goats, dogs, or other animals, ten rupees ³ a head, unless the person sending or delivering them to the administration caused them to be declared or declared them ³, at the time of their delivery ⁴ for carriage by railway, to be respectively of higher value than five hundred, fifty, or ten rupees a head, as the case may be.

(2) Where such higher value has been declared, the railway administration may charge, in respect of the increased risk, a percentage upon the excess of the value so declared over the respective sums aforesaid.

(3) In every proceeding against a railway administration for the recovery of compensation for the loss, destruction, or deterioration of any animal, the burden of proving the value of the animal, and, where the animal has been injured, the extent of the injury shall lie upon the person claiming the compensation ⁵.

Old Acts.

Act IV of 1879.)
Act XVIII of 1854. } No corresponding provision.

(Notes).

(General).

(1) Analogous provision.

Cf. S. 7, the Railway and Canal Traffic Act, 1854 (17 and 18 Vic., C. 31). S

(2) Scope of section.

This section limits the amount of compensation recoverable for the loss, destruction or deterioration of animals. T

1.—“Loss, destruction. or deterioration of animals.”

See notes under S. 72, *supra*, and S. 75, *infra*.

(1) Duty to carry animals.

(a) It is not necessary for a Railway Company to carry cattle otherwise than according to its profession. *Donohoe v. L. and N. W. Ry. Co.*, 15 W. R. 792. U

(b) Where a Railway Company received cattle and there was nothing to show that there were any ordinary cattle trains on the line, it was left to the jury to say whether the company should have sent them on by a special train. (*Ibid.*) Y

(c) The jury will not be directed that the company are bound to forward cattle only by ordinary trains (*Ibid.*) W

(d) The delivery of cattle must be in a fit and proper place. *Rooth v. N.E. Ry. Co.*, L.R. 2 Ex. 173. X

1.—“Loss, destruction, or deterioration of animals”—(Continued).

- (e) Though a Railway Company may not be bound to provide fences or guards at the place of delivery for preventing the animals from straying on to the line, the responsibility of the carrier does not come to an end until such time as the owner or consignee has had, or by watchfulness, might have had an opportunity of removing the animals. *Roberts v. N. E. Ry. Co.*, 36 L.J. Ex. 83; *Sheppard v. B. & E. Ry. Co.*, 37 L.J. Ex. 113. Y

(2) Carriers of animals.

A Railway Company undertaking to carry live animals is subject to the ordinary carrier's liability with regard to them. *Manchester v. Lancashire and Yorkshire Ry. Co.*, 4 H. and N. 327. Z

(3) Vice in case of animals.

- (a) In the case of animals, the carrier is not liable for injury arising from the inherent vice of the animal. *Blower v. Gt. Western Railway Co.*, L. R. 7 C. P. 655. A
- (b) But this does not mean that the animal must be shown to be vicious in the ordinary sense. (*Ibid*) B
- (c) It is sufficient if, there being no negligence on the carrier's part and nothing extraordinary being shown to have happened, the animal is found injured owing to its own struggles. (*Ibid*) C
- (d) The carrier cannot be charged with negligence, if an animal escapes by reason of the insufficiency of a chain and collar, which is sent with it by the owner and appears to be sufficient. *Richardson v. N. E. Ry. Co.*, L. R. C. P. 75. D
- (e) The case would, however, be different if the fastening could be seen to be insufficient. *Stuart v. Badly*, 2 Stark 323. E
- (f) In *Richardson v. N. E. Ry. Co*, *supra*, the company would probably, upon the facts, have been held liable, whether there was negligence or not, on the ground that the conditions upon which it undertook to carry the dog were not signed by the owner, and that therefore the ordinary carrier's liability attached. But the special case expressly found that the company was not common carriers of animals. F

(4) Restiveness.

A condition exonerating the company from liability for damage occasioned by kicking, plunging, or—, does not exonerate the company if the— is caused by the company's negligence. *Gill v. Manchester Ry. Co.*, L. R. 8 Q.B. 186. G

(5) Offer of free pass.

A condition exonerating the company from liability for negligence in carrying cattle is invalid, though there may be a subsequent condition offering a free pass to induce the owner to send a driver in charge, and the free pass is accepted. *Rooth v. N. E. Ry. Co.*, L.R. 2 Ex. 173. H

(6) Damage to be shown at time of unloading.

A condition that the company will not be liable for damage to cattle unless the damage is pointed out at the time of unloading, is unreasonable where there is no option. *Lloyd v. Waterford and Limerick Ry. Co.*, 15 Ir. C.L. 37. I

1.—“Loss, destruction, or deterioration of animals.”—(Concluded).

(7) Owner undertakes all risks :

(a) Where the owner undertakes all risks of conveyance whatever, the company will not be liable for damages to cattle caused because the trucks are unfit and unsafe. *Chippendale v. Lancashire and Yorkshire Ry. Co.*, 21 L.J. Q.B. 22. J

(b) And such a condition will exempt the Company from liability for gross negligence. *Carr v. Lancashire and Yorkshire Ry. Co.*, 7 Ex. 707. K

(8) Agent for delivery.

(a) A station-master is the—of animals carried through a railway. *Wright v. L. & N. W. Ry. Co.*, L.R. 10 Q. B. 298. L

(b) A station-master assenting to some other mode of delivery than the usual one will bind the Railway Company thereby. (*Ibid.*) M

(9) Consignment of animals—Detention—Liability of Railway Company.

Where, owing to a groundless claim made by a Railway Company, it refused to give delivery of cattle to the consignee at a time when he had absolute right for them, held, that the Company was liable for damage caused to the cattle by the exposure. *Gordon v. G. W. Ry. Co.*, L.R. 8 Q.B.D. 44. N

(10) Right of Railway Company to recover expenses incurred.—

According to the English Law, a Railway Company putting a horse at the end of a journey into a livery stable for its protection may recover the charges from the consignee. *G. N. Ry. Co. v. Swaffeld*, 43 L. J. Ex. 89. O

(11) S. 3 (b), Act XI of 1890 (Prevention of cruelty to animals)—Infliction of cruelty to animals by servants of company—Liability of company.

Where a Railway Company's servant inflicts cruelty to animals in spite of the Company's instructions to the contrary, the Company cannot be prosecuted for the act of its servants under S. 3 (b) of the Act for prevention of cruelty to animals, 1890. 26 B. 609 = 4 Bom. L.R. 290. P

(12) Conditions under which goods despatched by railway—Deterioration—Remoteness of damage.

Where the plaintiff had not informed the defendant Railway Company, at the time the Company undertook to carry his goods, that they were required by him at a specific time and for a specific purpose, he could not, on delay in delivery, claim the excess price which he could have realised on a sale of them at such time and place. Nor could he recover any expenses incurred by him, which were not the proximate and direct consequence of the delay, in the delivery of the articles. Also, except on proof of deterioration, the plaintiff would be bound by the conditions on the back of the forwarding note signed by him. 21 M. 172. See *Wilson v. Lancashire and Yorkshire Ry. Co.*, 30 L.J.C.P. 282, and *Gee v. Lancashire and Yorkshire Ry. Co.*, 30 L.J. Exch. 11. Q

2.—“Mules, donkeys.”

The words “mules” and “donkeys” were added by the Indian Railways Act (1890), Amendment Act (IX of 1896), S. 4. R

3.—“Caused them to be declared, or declared them.”

Declaration of value.

- (a) The—under S. 7, the Railway and Canal Traffic Act, 1854, must be such as to convey a distinct intimation that the sender intends to hold the company responsible for the higher sum. *Robinson v. L. and S.W. Ry. Co.*, C.P. 19 N.S. 51. **S**
- (b) If there is no such declaration, the Company cannot demand insurance money beyond the usual charge, on the ground that a servant of the Company has been casually informed what the animal is worth. (*Ibid.*) **T**

4.—“At the time of their delivery ”

Protection of Railway Company.

- (a) A Railway Company has the right of protection, even though a complete contract for carriage of the animal has not been entered into and no delivery of it has taken place. *Hobymann v. West Mid. Ry. Co.*, 5 B & S. 560. **U**
- (b) It is sufficient if the animal is about to be delivered to, or received by the Company. (*Ibid.*) **V**
- (c) Miller, J. in the same case has said “So soon as the horse enters the Railway Company’s premises for the purpose of being received, forwarded and delivered, the act of delivering begins, and, if the person sending a horse to be carried on the railway desires to be in a position to recover against the Company greater damages than the amount limited by the statute, he must have made the requisite declaration of value before the horse was taken to the premises of the Railway Company. This may give rise to some inconvenience, but I cannot construe the words “time of such delivery” otherwise, without holding that the legislature deemed it expedient to limit the liability of the Company during the existence of the contract to carry, but made no provision for the equally probable risk to the Company attending the act of receiving and delivering into their care ” **W**

5.—“In every proceeding... compensation.”

What value binding on consignor.

Value declared is binding on the consignor. *McLance v. L & N. W. Ry Co.* 3 H. and C. 343. **X**

74 A railway administration shall not be responsible for the loss, destruction, or deterioration ¹ of any luggage belonging to, or in charge of, a passenger ² unless a railway servant has booked and given a receipt ³ therefor.

Further provision with respect to the liability of a railway administration as a carrier of luggage.

Old Acts.

Act IV of 1879 .. S. 12.

Act XVIII of 1854 .. S. 9.

N.B.—The words “or in charge of a passenger” are new.

(Notes).
General.

(1) Scope of section.

This section provides for freedom from responsibility, for the "loss or deterioration of the parcel or package" not merely for freedom from responsibility for the loss of the contents of such parcel or package. 73 P. R. 1907. X 1

(2) Object of the rule contained in this section.

The—is obviously to make the Company liable only for property entrusted to it and not for property which a passenger chooses to keep in his own custody, whether in his compartment or elsewhere. (*Ibid*). Y

(3) Provisions of this section.

The—will not prevent the Railway Company being liable, if, in fact, it does not arrange for, but neglects the practice of, booking luggage, and then accepts luggage without requiring it to be booked. See Collett on Torts, p. 235. Z

1.—"Loss, destruction or deterioration."

See cases noted under S. 72, *supra*, and S. 75, *infra*. A

2.—"Any luggage....passenger."

Personal luggage defined.

Whatever the passenger takes with him for his personal use or convenience according to the habits or wants of the class to which he belongs, either with reference to the immediate necessities or to the ultimate purpose of his journey, must be considered as personal luggage. *Macrow v. Great Western Railway Co*, L.R. 6 Q.B. 612 (622). B

(1) Articles held to be passenger's luggage.

- (a) Passenger's clothing. (*G.N.Ry. Co. v. Shepherd*, 21 L. J. Ex. 286).
- (b) What is reasonable from the position of the passenger and the journey he is upon, will be deemed luggage. (See Collett on Torts, p 232.)
- (c) Everything for the personal convenience of a passenger. (*G.N. Ry. Co. v. Shepherd*, 21 L.J. Ex. 286).
- (d) Perhaps, even a small present, had he such with him. (*Ibid*.)
- (e) A book on the journey. (*Ibid*.)
- (f) A reasonable amount of money for use. (See Story on Bailments, 498).
- (g) A watch. (*Ibid*.)
- (h) A pair of just ls. (*Ibid*)
- (i) A pair of sheets or the like, taken by a passenger for his own use on a journey. *Macrow v. G. W Ry Co*, L R. 6 Q. B 612 (622).
- (j) A hamper, containing provisions intended as a present. *Case v. T. and S.W. Ry. Co.*, L.J. Jan. 3, 1880, p. 9. C

N.B.—But this decision seems to be inconsistent with the other authorities.

(3) Articles held not to be passenger's luggage.

- (a) Merchandise and materials intended for trade and to be sold at a profit. (*Baill v. L. and N. W. Ry. Co.*, 13 C.B.N. S. 816).
- (b) A trunk of laces, silks, or samples of merchandise. *Phelpson v. London etc., Ry. Co.*, 11 Jur. N.S. 652.
- (c) Pencil sketches of an artist. *Mytton v. Midland Ry. Co.*, 23 L.J. Ex. 385.

2.—“Any luggage....passenger.”—(Continued).

(d) Articles of such shape or size that they cannot reasonably be carried as personal luggage. *Hudston v. Mid Ry. Co.*, L.R. 4 Q.B. 366.

(e) A spring horse. (*Ibid.*)

(f) A bicycle. *Britten v. G. N. Ry. Co.*, (1899) 1 Q.B. 243.

(g) Children's play things. *Hudston v. M. Ry. Co.*, L.R. 4 Q.B. 366.

(h) Title deeds (not his own) and bank notes intended to be used by a solicitor in a cause in which he is engaged. *Phelps v. L. & N. W. Ry. Co.*, 84 L. J. C. P. 259.

(i) Bedding for the use of a household. *Macrow v. G. W. Ry. Co.*, L. R. 6 Q. B. 612 (622).

(j) A quantity of blankets and quilts for the use of the passenger's household. (*Ibid.*) D

(4) Passenger's luggage—Liability.

The Company are subject to the ordinary liabilities of carriers with regard to the personal luggage of a passenger carried for hire when the luggage is placed in a separate van or other place appropriated for the purpose. *Macrow v. Gt. Western Ry. Co.*, L. R. 6 Q. B. 612. E

(5) Servant may sue though master paid the fare.

(a) A servant, whose fare has been paid by his master, can maintain an action for loss of luggage. *Marshall v. York, Newcastle and Berwick Ry.*, L. 21 J. C. P. 34.

(b) It appears to be immaterial by whom the fare is paid. (*Ibid.*)

(c) So an officer carried under contract with the Government may sue for the loss of his luggage through negligence. *Martin v. Great Indian Peninsula Ry. Co.*, L.R. 3 Ex. 9. F

(6) Luggage in custody of Company.

(a) Luggage in the carriage, if placed there with the knowledge and assent of the Company's servants, is in the custody of the Company. *G.N. Ry. Co v. Shepherd*, 8 Exch 30.

(b) But their liability is much modified thereby, and the passenger is bound to take ordinary care of it. *Talley v. G W. Ry. Co.*, L.R. 6 C.P. 44.

(c) Where luggage etc. is locked in the cloak room at a railway station, it is not received by the company as carriers, but is a deposit with or without hire as the case may be. *Van Toil v. S. E Ry. Co.*, 8 Jur. N. S. 1213. G

(7) Liability of railway administration as carrier of luggage.

The liability is only to the passenger whose property the luggage appears to be. *Becher v. G.E. Ry Co.* L.R. 5 Q.B. 241. H

(8) Person not travelling with luggage cannot sue.

(a) Thus, a person sending his luggage by his servant cannot maintain an action for its loss. (*Ibid.*) I

(b) Where a servant is travelling with luggage of his master who is not travelling by the same train, the master is not entitled to sue on contract for damage done to his property while in charge of his servant. *Mewa v. G.N. Ry. Co.*, (1896) L.R., 2 Q.B. 387. J

2.—“Any luggage....passenger.”—(Continued).

(c) But the master has a right to bring an action on tort and recover. (*Ibid.*) K

(9) When liability commences.

(a) The liability of the Company for passenger's luggage commences from the time when it is delivered to the servants of the Company for the particular journey, though the train may not start for a considerable time. *Lovell v. L. C. & D. Ry. Co.*, 45 L.J.Q.B. 476. L

(b) The Company is not justified in refusing to take charge of passenger's luggage as common carriers, because it is packed up in a shawl. (*Munster v. S. E. Ry. Co.*, 27 L.J.C.P. 308). M

(10) Luggage placed in compartment with passenger.

(a) The ordinary carrier's liability does not extend to luggage placed at the passenger's request in the carriage in which he intends to travel. *Berghem v. Great Eastern Ry. Co.*, 3 C.P.D. 221. N

(b) The Company is only liable for the loss of such luggage if there has been negligence. (*Ibid.*) O

(11) Merchandise carried as luggage.

(a) If the passenger carries, among his luggage, merchandise for which the Company is entitled to charge, he carries it at his own risk. (*Cahill v. L. & N. W. Ry. Co.*, 13 C.B.N.S. 818). P

(b) (i) Where luggage is carried free, the merchandise should be paid for, if a box, obviously containing merchandise but carried as luggage, is lost or stolen, the carrier is not liable. *Belfast Ry. Co. v. Keys*, 8 Jur. N.S. 337. Q

(ii) And the acceptance of the box by the carrier's servant in violation of the rule, does not alter the carrier's contract. (*Ibid.*) R

(c) (i) Possibly, if the Company have notice that the passenger has with him goods which are not personal luggage, and choose to carry them, they would be responsible. See *Great Northern Ry. Co. v. Shepherd*, 8 Ex. 20; *Cahill v. L. & N. W. Ry. Co.*, 13 C.B.N.S. 818. S

(ii) That the box is marked outside “glass,” does not amount to such notice. *Cahill v. L. and N. W. Co.*, 8 Jur. N. S. 1063. T

(d) On the other hand, if the passenger has notice that the Company carries merchandise only upon certain payments being made, and he is allowed to take a parcel which is obviously merchandise, he cannot maintain an action. *Belfast and Ballymena Ry. Co. v. Keys*, 9 H. L. 556. U

(12) Ss. 47, 72 and 74—Passenger's “luggage,” articles of merchandise sent as—Loss in transit—Liability of Railway Company.

(a) Where a package containing merchandise, delivered by a passenger to the servants of a Railway Company to be carried as passenger's “luggage” was lost held that the Railway Company was bound to make good the loss. 13 C. W. N. 947. Y

(b) The liability arises under S. 72 of the Act, which specifically excludes the operation of the common law as to carriers and the Carriers Act of 1865 to such cases of loss of goods. (*Ibid.*) W

(c) Rule 76 of the rules of the Railway Company, by providing that “persons tendering amongst their luggage articles not properly classifiable as such

2.—“Any luggage....passenger”—(Continued).

do so at their own risk,” did not absolve the Railway Company from liability. (*Ibid.*) X

(13) Personal luggage of passengers—Delivery of.

(a) It is the duty of a Railway Company, in regard to the luggage of a passenger (which travels by the same train, but not under his control) which has reached its destination, to have the luggage ready on the platform at the usual place of delivery until the owner, in the exercise of due diligence, can call and receive it. *Patscheider v. Great Western Ry. Co.*, L. R. 3 Ex. Div. 153, cited in 3 B. 96. Y

(b) The liability of a Railway Company as carriers continues for a reasonable time after the arrival of the goods at the station of destination. (*Ibid.*) Z

(c) (i) Where the Railway Company has provided for porters for carrying the luggage of the passenger from the platform to the carriage engaged by him for its removal, the Railway Company's liability continues till the porters have discharged their duty. *Richards v. L. B. and S.C. Ry. Co.*, L. R. 3 Ex. D. 153. A

(ii) The liability continues till the duty is done by placing it in the passenger's cab or coach. *Richards v. L. B. & S.C. Ry. Co.*, 7 C.B.S. 39. B

(14) Non-liability.

A Railway Company is not liable, when a passenger walks home leaving his luggage with a porter, saying he will send for it, the reason being that the transaction amounts to a re-delivery to the porter as agent for the passenger. *Hodkinson v. L. & N.W. Ry Co*, L.R. 14 Q.B.D 228 C

(15) Luggage labelled and placed in rail—Passenger not getting into train—Luggage not restored—Liability.

(a) ENGLISH LAW.

Semble.—According to the—, when a passenger, seeing his luggage labelled and placed in the van, through some accident is not able to get into the train which goes off with it, and the luggage is never restored to the passenger, *held*, that there is evidence of negligence on the part of the Railway Company. *Cutler v. North London Ry. Co.*, L.R. 19 Q.B. D. 64. D

(h) INDIAN LAW.

In India, under such circumstances, if the Railway Company has given a receipt it must show that the care prescribed by S. 72 of the Act has been taken, by it. E

(16) Cloak-room ticket.

Upon the question whether a—, with the usual conditions exonerating the company from liability, applies only to luggage actually placed in the cloak-room, or extends to luggage wherever it may be warehoused by the Company, *See Harris v. Gt. Western Railway Co.*, 1 Q.B.D. 515. F

(17) Warehousing luggage—Rule under S. 47 (1) (f) *supra*, as to deposit of articles in cloak-room.

See Rules regarding the warehousing and detention of goods, (23-27), noted under S. 47 (1) (f), *supra*. G

2.—“Any luggage....passenger” —(Concluded). #

(18) Right of passenger to his luggage at any time, en route.

(a) ENGLISH LAW.

According to the—, “a traveller by railway, dissatisfied with his mode of travelling, may at any point stop and require that his luggage should be delivered to him.” *Per Martin B. in Scott v. S. Staff Ry. Co.*
8 Ex. 841. **H**

(b) INDIAN LAW.

It is doubtful whether a passenger is entitled to his luggage at any time en route. **I.**

3.—“Receipt”

Receipt given to a passenger under this section

The—is a token of delivery to the railway administration for carriage by a railway. 56 P.R. 1897. **J**

75. (1) When any articles mentioned in the second schedule are contained in any parcel or package¹ delivered

Further provision with respect to the liability of a railway administration as a carrier or articles of special value.

to a railway administration for carriage by railway, and the value² of such articles in the parcel or package exceeds one hundred rupees, the railway administration shall not be responsible for the loss, destruction, or deterioration³ of the parcel or package⁴ unless the person sending or delivering the parcel or package to the administration caused its value and contents to be declared, or declared them at the time of the delivery of the parcel or package for carriage by railway,⁵ and, if so required by the administration, paid or engaged to pay a percentage on the value so declared by way of compensation for increased risk.⁶

(2) When any parcel or package of which the value has been declared under sub-section (1) has been lost or destroyed, or has deteriorated, the compensation recoverable in respect of such loss, destruction, or deterioration shall not exceed the value so declared, and the burden of proving the value so declared to have been the true value shall, notwithstanding anything in the declaration, lie on the person claiming the compensation.

(3) A railway administration may make it a condition of carrying a parcel declared to contain any article mentioned in the second schedule, that a railway servant authorized in this behalf has been satisfied by examination or otherwise that the parcel actually contains the article declared to be therein.

(Old Acts).

Act IV of 1879-Cf. S. 11 with Sub-Ss. 1 and 2 of the present section.

„ XVIII of 1854-Cf. S. 10 with Sub-Ss. 1 and 2 of the present section.

Sub-S. 3 is new.

(Notes).

General.

(1) Analogous provision.

Cf. the Carriers Act 1830, (11 Geo. IV, and 1 Will. IV, c 68, S.I.)

(2) Nature of the obligation of common carriers to carry goods with safety.

(a) "To give due security to property, the law has added to that responsibility of a carrier which immediately arises out of his contract to carry for a reward, namely, that of taking all reasonable care of it, the responsibility of an insurer. From his liability as an insurer the carrier is only relieved by two things, viz., the act of God and the King's enemies." *Per Best, C.J. in Riley v. Horne*, 5 Bingh 217, cited in 19 B. 165 (181).

(b) "He (the common carrier) is considered as having contracted to insure the safe delivery of, that is to say, as having contracted to carry and deliver safely and securely (the act of God and of the Queen's enemies alone excepted) the goods of which he as common carrier is bailee." *Berghem v. The Great Eastern Ry. Co.*, 3 C.P.D. 22, cited in 19 B. 165 (181).

(c) "The reason why the law implied that this is his contract was that the carrier had, by himself or his servants during the bailment at times and in places where he could not even be supervised, the exclusive control and care of the goods entrusted to him by the owner, and, consequently to prevent fraud, the law imposed on those who contracted to carry goods as common carriers the obligation also to undertake to insure their safety." (*Ibid*)

(d) "The law and liabilities of common carriers are founded on custom irrespective of contract. A common carrier is and always has been liable to be sued for any breach of this common law duty in an action for tort." *Per Garth, C.J., in 10 C. 166* (186).

(e) "It is true that, when the employment of a common carrier has commenced, the law implies a contract on his part to perform the duty imposed upon him, and consequently he is liable to be sued in an action either of tort or contract, according to the conveyance or advantage of the plaintiff in each suit. (*Ibid*) (See Bulleu and Leake on Pleadings pp 101 & 243)

action, scope of.

This section declares that, where the cost of valuable goods sent by Railway exceeds Rs. 100 in value, the Company cannot be held liable for loss of them unless the sender had declared the true nature and value and paid higher charges for the increased risk, the word "value" in the section clearly meaning the price for which they would usually sell at the time in the market. (*In the Sadar Court of the Province of in 31st Dec. 1894.*)

General—(Concluded).

(4) Plaintiff transgressing provision of S. 10, Act XVIII of 1854.

A plaintiff who has transgressed the provisions of S. 10 Act XVIII of 1854 (= present section), is not entitled to decree, even though the defendant's servants have been guilty, as carriers, of negligence or criminal acts within the meaning of S. 8, Act III of 1865. Appeal No. 97, 29th April 1879, D.C.R., Part X (32). R

1.—“Any parcel or package.”

(1) “Any parcel or package”—Scope of the expression.

The words “any parcel or package” in this section include “passenger's” luggage dealt with by S. 74 of the Act. 73 P.R. 1907. S

(2) Luggage belonging to, or in charge of, a passenger.

(a) A—which has been booked by a railway servant and for which a receipt has been given under S. 74 of the Act, is a parcel or package delivered to a railway administration for carriage by a railway within the scope of S. 75 of the Act. 56 P.R. 1897. T

(b) Hence, on a plaintiff failing to make declaration in respect of such “luggage” which was valued at a sum exceeding Rs. 100, held, that, under S. 75 of the Act, the railway administration was free from liability for the loss, thereof, both as regards scheduled and non-scheduled articles contained therein. (*Ibid*) U

2.—“The Value.”

“Value” Meaning and scope of the term.

(a) That term “value” refers to the intrinsic value at the time the parcel was delivered to the railway *Stoessiger v. S. E. Ry Co.*, 8 E. and B. 549. Y

(b) The word “value” clearly means market-value of the articles, the price for which they would usually sell at the time in the market. (In the Sadar Court of the Province of Sind, 31st Dec. 1891). W

(c) The words in the section “the value” mean that value at destination, and not at place of despatch which represents the proper measure of damages in the event of loss of the goods. (*Ibid*). X

(d) Discount allowed by the seller to the particular purchaser or consignee cannot legally be deducted from the “said value.” (*Ibid*). Y

3.—“Railway administration...deterioration.”

(1) Loss, destruction or deterioration.

(a) The words “of the parcel” in this section include the loss caused by the criminal misappropriation of the parcel by a servant of the Railway administration in charge thereof. 19 B. 159. Z

(b) The word “loss” in S. 10, Act XVIII of 1854, applies to a case where the loss is caused by the criminal act of the servants of a railway company. 5 M. 208 (212). A

(c) The term “loss or injury” in S. 10 is not to be limited to accidental loss or accidental injury but would cover also cases where the loss or injury was occasioned by the gross negligence or injury or criminal acts of the company's servants. (*Ibid*). B

3.—“*Railway administration... deterioration*”—(Concluded).

(2) *Company's liability for loss of passenger's luggage.*

A railway passenger, whose box containing cloths, gold and silver ornaments and currency notes of value of over Rs. 100, has been entrusted to the Railway Company's servants for conveyance in the luggage van and has been lost or stolen, cannot recover the value of the box or of any part of its contents from the company, unless he had made the declaration prescribed by S. 75 (1) of the Act. 73 P.R. 1907. **C**

(3) *Through-booking of goods by steamer and rail—Liability of steamer company for loss during transmission by rail.*

The plaintiffs consigned a parcel of silk articles through the India General Steam Navigation and Railway Company, Ltd., for delivery at K, knowing that the articles would be carried in the first instance by the defendant company, then by the Eastern Bengal State Railway and then by the East India Railway Company. They did not declare the value of the articles which exceeded Rs. 100, nor disclose the contents of the parcel. It was found that the goods were lost after they had been made over to the Eastern Bengal State Railway. *Held*, that the agreement was not in substance with both the Steam Navigation Co., and the Railway Companies, and the former could not be held responsible for the loss. 11 C.W.N. 1076 (11 C.W.N. 1071, F.). **D**

(4) *Luggage in charge of a passenger, no declaration made re.*

Where the plaintiff had made no declaration in respect of a luggage booked by a railway and for which a receipt has been given under the provisions of S. 74, which was valued by him at a sum exceeding Rs. 100, *held*, that, under S. 75, the railway administration was free from liability for the loss thereof, both as regards scheduled and non-scheduled articles contained therein. 56 P.R. 1897. **E**

4.—“*Of the parcel or package.*”

(1) *Alteration in the law.*

(a) The words “of the parcel or package” in S. 75 form an alteration in the law. **F**

(b) According to the Old Acts (Act IV of 1879 and Act XVIII of 1854) protection was only extended to the contents of the parcel which should have been declared under those Acts. (See S. 11, Act IV of 1879 and S. 10 Act XVIII of 1854). **G**

(c) The same is the case under the English Carriers Act. *Treadwin v. G.E. Ry. Co.*, 37 L.J.C.P. 83. **H**

(d) But now, protection extends to the entire parcel or package, including the articles which should have been declared and those which need not have been declared. (See present section). **I**

(2) *Luggage in charge of passenger.*

Luggage belonging to, or in charge of a passenger which has been booked by a railway servant and for which a receipt has been given under the terms of S. 74 of the Act, is a parcel or package delivered to a railway administration for carriage by a railway within the scope of S. 75 of the Act. 56 P.R. 1897. **J**

5.—“Declared them....Railway.”

(1) Declaration of value necessary.

(a) Under this section the value and contents of articles exceeding Rs. 100 sent through the railway should have been declared. Where this is not done, the railway administration is not responsible for the loss of the goods. *Secretary of State v. Dorinda Ram*, (1894) Sadar Court of Sind. K

(b) Under this section it is necessary that both the value and the contents of the parcel if over Rs. 100 in value should be declared, before the Railway Company can be held liable in respect thereof. 19 B. 159. L

(2) Declaration of valuable goods, essentials of

(a) “The declaration must come from the sender, and must be so expressed as to be understood by the carrier as such, and, as I think, understood also as the foundation of a contract.” Per Byles, J., in *Robinson v. The South-Western Ry. Co.*, 34 L.J.C.P. 234, cited in 19 B. 165 (180). M

(b) “The declaration must be made with the intention that it should so operate as to entitle the company to charge the higher rate.” Per Smith, J. in (*Ibid*). N

(c) The conditions of S. 10, Act XVIII of 1854 (*Cf.* present section) are not fulfilled by the sender merely giving an account of the quantity and description of the goods delivered for carriage, when required to do so by the booking clerk. 5 M. 204. O

(d) Where a box containing 7 bars of silver valued at Rs. 4,296-10-9 had been delivered to the Railway Company at Trichinopoly Station for carriage to Bombay, held, that to establish the liability of the Railway Company in the case of excepted articles, the declaration on required by S. 10 Act XVIII of 1854 must be made in such a manner as to intimate that the sender invites the Railway Company to undertake the special risk and is willing to pay the increased charge. (*Ibid*). F

(e) A person who sends or delivers the parcel containing any of the valuable articles specified must take the first step by giving that information as to its contents to the carrier which he alone can give, and if he does not take that first step, he could not maintain an action, as S. 1 the English Carriers Act, 11 Geo. IV and 1 Will IV, c. 68, says that the carrier shall not be liable unless the declaration is made *Barendale v. Hart*, 6 Ex. 769, cited in 19 B. 165 (176). Q

(3) Omission to declare value and nature of goods, effect of.

Where the consignor, at the time of delivering valuable property to the Company's clerk, omitted to declare the nature and value thereof as required by the section, the Company cannot be held to be liable as bailees under the Indian Contract Act. 19 B. 165. R

(4) Valuable article not declared—Liability—Protection of Company.

(a) Where the value of an article of the kind specified in Sch. II has neither been declared nor insured, a Railway Company is not liable for non-delivery of the same. 2 M. 310. S

(b) The protection from liability, conferred on the Railway Company by S. 10, of Act XVIII of 1854, (*Cf.* present section) in cases in which the value of such property is not declared and the higher charge paid, does not

5.—“Declared them...Railway”—(Concluded).

cease on arrival of the parcel at the place of the destination but extends to period at which the consignee takes delivery. (*Ibid*). **T**

- (a) Coin sent by railway, lost in transit. No declaration of the contents of the box made, no increased charge paid and no insurance effected. *Held*, that the Company was not liable, its liability as common carriers having been taken away by Act IV of 1879. 19 B. 165. **U**

(b) Uninsured goods.

Plaintiff presented a bale of silk at the railway station at A for transport by rail to M. He was requested by the Railway Company to “insure,” but declined to do so, engaging that the goods should go at the owner’s risk. When the bale was delivered at M, it was discovered that the silk had been abstracted and hemp substituted. *Held*, under the circumstances, that the Railway Company were protected by S. 10, Act XVIII of 1854 (*Cf.* present section). 96 P.R. 1868. **V**

(6) Uninsured goods—Theft by Company’s servants.

Where plaintiff delivered two parcels of shawls to a Railway Company declaring the nature of the contents of the parcels, but saying nothing about their value, and one of the parcels was not delivered to the plaintiff at his destination, and he sued the defendants for its value, alleging that they had been stolen, *held*, that the plaintiff was bound to declare the value of the shawls. The plaintiff could only be excused from doing so by the defendants voluntarily or involuntarily leading him to believe that such a declaration was unnecessary, and he was protected from loss without making it. 29 P.R. 1872. **W**

6.—“If so required...risk.”

(1) Loss of valuable articles—English and Indian laws similar.

(a) Where the servants of a Railway Company received a box containing gold and silver coins, and the person delivering the same declared their value and nature, he was not bound to tender, but the carrier, must demand, the increased charge for insurance. 19 C. 538 (*dissented* from in 19 B. 165). **X**

(b) And if no such demand was made, the carrier would be liable for the loss of, or injury to, the goods, although the increased charge was not paid. (*Ibid*). **Y**

(c) The words of the English Act 11 Geo. IV, and 1 Wm. IV, c. 68, S. 1, and the words in Act IV of 1879, S. 11 (= present section) are practically the same so far as this matter is concerned. (*Ibid.*) (*Great Northern Ry. Co. v. Behrens*, 7 H. and N. 950, F.). **Z**

(2) Liability of receiving Company—Excess charge paid by the delivering Company—Alteration of contract.

The Nizams State Ry. Co. received certain goods to be delivered to the plaintiffs at Agra station through the G.I.P. Ry. Co. and received a certain amount for the wagon load. At Agra, the G.I.P. Ry. Co. refused to deliver goods, unless a further amount was paid at maund rate. The plaintiffs paid the amount under protest and brought a suit for recovery of the amount against both the Railway Companies. *Held*, that the Nizam’s State Ry. Co. being the principal and the G.I.P. Ry. Co. being their agents, the former were so liable in damages to

6.—“If so required...risk”—(Concluded).

the plaintiffs. Held also that the Railway Company were not competent to alter the contract between the parties and charge per maund rate instead of waggon rate as settled. 29 A. 228 (F.B.)= A.W.N. (1907) 4=4 A.L.J. 80=2 M.L.T. 2. **A**

(3) Payment of increased charge—Effect.

(a) The payment of the increased charge in S. 11 of Act IV of 1879 attaches to a Railway Company the liability of ordinary bailees. 17 B. 728. **B**

(b) The payment, by a consignor of silver coin, of the specie rate required by the general regulations of a Railway Company to be paid for the carriage of such goods, is not such a payment as satisfies the requirements of this section. 19 B. 159. **C**

(9) Increased charge on declaration of value, not an insurance charge.

A charge of insurance is not covered by the phrase “an increased charge” in this section. The fulfilment of the considerations specified in the section does not extend the liability of the Company to that of insurers but merely regulates them to the position of ordinary bailees. 17 B. 728 **D**

(5) Omission to demand extra charge for valuables.

(a) The benefit of this section cannot be given to the Railway Company where they had received valuable goods after declaration of value without demanding an extra charge for insurance, and where the excess charge was not at all brought to the notice of the consignee, the carrier will be liable for the loss of, or injury to, the goods, although the increased charge has not been paid. 19 C. 538 (541). **E**

(b) Where a carrier receives goods of the description mentioned in 11 Geo. IV and 1 Wm. IV, ch. 68, and the person delivering the same has declared their value and nature, he is not bound to tender, but the carrier must demand, the increased charge mentioned in the notice affixed in the office, warehouse, or receiving house, whether the goods are there delivered, or to a servant sent to fetch them; and if no such demand is made, the carrier is liable for the loss of, or injury to, the goods, although the increased charge has not been paid. *The Great Northern Ry. Co. v. Behrnes*, 7 H. & N. 950, cited in 19 C 538. **F**

(General).

S. 1, English Carrier's Act, 1830, Will IV, c. 687.

According to this section contractors, coach proprietors, and carriers, *held*, not liable for loss of certain goods above the value of £ 10, unless delivered as such and increased charge accepted. **G**

ENGLISH LAW—S. 1, ENGLISH CARRIERS ACT, 1830, (1 Wm. IV. c. 68), CASES UNDER.

(1) Formal notice of nature of goods not necessary.

A formal notice of the nature of the goods is not necessary, if it is in fact brought to the notice of the Company what the goods are, and their value is sufficiently stated to enable the carrier to fix the additional charge he is entitled to make. 19 W. R. 800. **H**

General—(Continued).

(2) Gross negligence.

The carrier is protected by S. 1 of the English Carriers Act, 1830, even if there is—*Hinton v. Dabdin*, 2 Q. B. 646. I

(3) Loss.

(a) A loss of season or market is within S. 1 of the English Carriers Act, 1839 (1 Will IV. c. 68) (Cf. present section). *Wilson v. L. & Y. Ry. Co.*, 9 C. P. (N. S.) 632. J

(b) So also a loss through delivery to a wrong person by mistake. *Moritt v. N. E. Ry. Co.*, L.R. 1 Q.B.D. 302 (308) J1

(c) So also a temporary loss necessitating the replacing of articles by the owner. *Mullen v. Brasch*, L. R. 10 Q.B.D. 142. K

(d) The loss ought to be a loss by the carrier, and not a loss by the owner merely in consequence of the non delivery of the article in due time. *Hearn v. L. and S. W. Ry. Co.*, 10 Ex. 793. L

(4) Delay from temporary loss

S. 1 of the English Carriers Act, 1830, protects the carrier from the consequences of delay in delivering the goods owing to a temporary loss. *Wallace v. Dublin and Belfast Junction Ry. Co.*, L.R. 8 C. L. 341. M

(5) Delay, where no loss.

But not against delay in delivery, where there is no loss of goods *Hearn v. L. and S. W. Ry. Co.*, 10 Ex. 793. N

(6) If value declared, carrier liable

(a) If the value and nature of the articles is declared, the common law liability of the carrier revives, whether he demands an increased charge or not. *Behrens v. G. L. Railway Co.*, 6 H. & N. 366 O

(b) Prior to the carrier being made liable the value and nature of the contents of a parcel must be declared. *Hart v. Buxendale*, 6 Ex. 769. P

(c) The necessity of declaring the nature of the articles is not put an end to, by the fact that the nature of the articles are obvious to conjecture or guess. *Boys v. Pink*, 8 C. & P. 361. Q

(7) Parcel or package

A waggon containing articles of the kind mentioned in S. 1 of the English Carriers Act, but open at the top so that the Company can see what the articles are, is a "parcel or package" within that section. *White v. Lancashire and Yorkshire Ry. Co.*, L. R. 9 Ex. 67 R

(8) Articles within S. 1 of the English Carriers Act, 1830.

(a) Ivory, black, and agate bracelets, shirt pins, common gilt rings, brooches, tortoise shell purses, glass smelling bottles. *Bernstein v. Buxendale*, 6 C.B.N.S. 271. S

(b) Ivory fans *A.G. v. Hartley*, 5 Ru.s. 173. S1

(c) A chronometer. *Le Conteur v. L. and S.W. Ry. Co.*, L.R. 1 Q.B. 541. S2

(d) Maps with their cases. *Wyld v. Pickford*, 8 M. and W. 443. S3

(e) Pictures with their frames. *Henderson v. L. and N.W. Ry. Co.*, L. R. 5 Ex. 90. S4

(f) Prints and coloured prints. *Boys v. Pink*, 8 C. and P. 361. T

General—(Concluded).

- (g) A looking-glass. *Owen v. Burnett*, 2 C and M. 353. **T1**
 (h) Silk-dresses. *Flower v. S.E. Ry. Co.*, 16 L.T.N.S. 329. **T2**
 (i) Silk-tights and hose. *Hart v. Buxendle*, 6 C.B.N.S. 251. **T3**
 (j) Elastic silk webbing. *Bunt v. Midland Ry. Co.*, 2 H. & C. 889. **T4**
 (k) And possibly the packing case, if it contained only articles within S. 1 of the English Carriers Act 1830. *Iradwin v. G.E. Ry. Co* L. R. 3 C.P. 308. **U**
- (9) **Articles not within S. 1 of the English Carriers Act, 1830.**
 (a) German silver fuzee boxes. *Bernstein v. Barendale*, 3 C B N S. 251. **Y**
 (b) A document in the form of a bill of exchange accepted by the person to whom it was directed, but having no drawer, and found by the jury to be of no value when delivered to the carrier *Stoessiger v. S. E. Ry. Co.*, 7 S.E. and B 549. **W**
 (c) Painted carpet designs. *Woodward v. L and N W. Ry Co.* 3 Ex. D 121. **X**
 (d) The frame of a silk vestment not usually framed. *Treadwin v G. E. Ry. Co*, L.R. 3 C.P 308 **Y**
 (e) Hat bodies made partly of fur and partly of wool. *Mayhew v. Nelson*, 6 C.P. 53. **Y1**
 (f) A packing case containing some articles not within S. 1 of the English Carriers Act, 1830. *Treadwin v. G E. Ry. Co*, L R. 3 C P. 308. **Z**
- (10) **Articles which must be declared under the Indian Act.**
 See Sch. II to this Act.

76. In any suit against a railway administration for compensation for loss, destruction, or deterioration of animals or goods delivered to a railway administration for carriage by railway, it shall not be necessary for the plaintiff to prove how the loss, destruction, or deterioration was caused.

Burden of proof in suit in respect of loss of animals or goods 1

Old Acts

Act IV of 1879 .. S. 13.

Act XVIII of 1854 .. No corresponding provision.

(Notes).

N.B.—See notes under Ss. 72, 73, 74. *supra*.

General.

(1) Scope of the section—Burden of proof.

- (a) The provisions of this section cast, not on the plaintiff, but on the Railway Company, the burden of establishing the circumstances which, under the Indian Contract Act, would exonerate the bailee from liability. On the plaintiff proving the delivery of the goods to the Company and the destruction while in their custody, it is for the Company to establish the circumstances which would entitle them to be relieved from liability. 22 A. 36, see also 26 G. 398. **A**
- (b) It is true that, by S. 13. Act IV of 1879 (*Cf.* present section), a plaintiff who sues a carrier for the loss of goods is not bound in the first instance to prove how their loss occurred; but nothing is more easy than for the carrier to call his servants as witnesses, and to prove *prima facie* that the goods were stowed and protected in the usual way, and so to throw upon the plaintiff the *onus* of proving some negligence or criminality on the part of the carrier or his servants. 10 C. 166 (188). **B**

1.—“ *Burden of proof....goods.*”

- (1) **Onus of proving that loss of goods booked under Risk-note was caused by some default for which Railway Company was liable.**

See 8 N.W.P. 200,

C

- (2) **Onus of proving that goods entrusted to Railway Company were lost.**

See 7 B. 478 ; 17 M. 445.

D

- (3) **Onus of proving how the goods entrusted to Railway Company were lost.**

See 17 B. 417 ; 17 M. 445.

E

- (4) **Onus of proving negligence in suit against Railway Companies for non-delivery of goods.**

See 3 B. 120 ; 22 A. 361.

F

- (5) **Onus of proving negligence on the part of the Railway Company, in not preventing dangerous goods being carried in trains by passengers**

See 26 C. 465 ; 5 C.W.N. 449.

G

- (6) **Onus of proving that goods were not stolen by Railway servants or their agents.**

- Where goods carried in a train of the defendants from Nangan to Egaptur were plundered during the journey, held, that the defendants were entitled to the benefit of S. 152 of the Contract Act, and should be permitted to give evidence that the robbers of the plaintiff's goods were not servants or agents of the defendants, and that the defendants (by their servants and agents) took as much care as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value of the goods in question. 3 B. 96.

H

- (7) **Consignor asserting that goods were delivered to wrong person—Onus.**

- (a) On a consignor asserting that the goods were not lost but were delivered to a wrong person, the burden of proof lay on him to prove his case. 14 M.L.J. 396.

I

- (b) It is incumbent on the consignor to show that the circumstances under which the goods disappeared, were not such as to amount to “loss” within the meaning of the “risk-note.” 14 M.L.J. 396.

J

- (8) **Loss of goods—Suit for damages—Burden of proof.**

In a suit for damages occasioned by a loss of goods delivered to a Railway Company, the plaintiff need not prove how the loss was caused, but on proof of the loss, the Company is bound to show that the loss occurred under circumstances which would exempt a bailee from responsibility for it. 17 M. 445.

K

- (9) **Suit for damages against Railway Company—Onus.**

In a suit against a Railway Company by a person who has given an indemnity note to free the Company of “all responsibility for any loss or damage whatever arising under certain circumstance” it is for the defendant to show that the loss of the goods did not occur through the negligence or misconduct of their servants, and that it is covered by the terms of the note. Appeal No. 92, 26th April 1879, D.C.R. Part X (31).

L

1.—“Burden of proof....goods.”—(Concluded). 0

(10) Suit for compensation for damages caused to horse during transit—Onus.

(a) Where the plaintiff brought a suit against the Smith, Punjab and Delhi Ry. Co., to recover Rs. 50 as compensation for injuries sustained by a horse while being carried by the defendant's railway from Umballa to Lahore, alleging that owing to the negligence and unskilfulness of the Company's servants the horse was thrown down and injured while being carried as aforesaid, *held*, that the question of the liability of the defendants to make compensation to the plaintiff turned under S. 153, Act IX of 1872, on whether the defendants took as much care in respect of the horse as a man of ordinary prudence would, under the circumstances of the case, have taken of a horse of his own of equal value, and that the *onus* of proving that they took this amount of care was, under S. 13, Act IV of 1879 (*Cf.* S. 76, present Act), on the defendants. 127 P.R. 1882. M

(b) Where the sender was not required by the company to sign an agreement as prescribed by S. 10, Act IV of 1879 (= S. 72, present Act), nor to make any declaration of the value of the horse, and the horse was received without such declaration and the rate demanded by the defendants' servants was paid, the defendants could not claim to be absolved from liability to make compensation to the full extent for the injuries shown to have been caused to the horse by the want of due care on the part of their servants (*Ibid.*) N

(11) Duty of Railway Company as carrier—Burden of proof.

(a) A horse carried by the defendant railway company was injured on the way and died a few days after. The horse was not carried at the owner's risk, nor was it insured. The plaintiff, suing for damages alleged in the plaint that the accident was due to a defect in the horse-box, but failed to prove it. The suit was thereupon dismissed. *Held*, on appeal, that the burden of proof lay on the defendant company, under S. 72 of the Act, to prove that it discharged the duty of a bailee under S. 151 of the Contract Act. 3 N.L.R. 94. O

(b) The burden would only be discharged by proof that the horse-box was in all respects sufficiently fitted and adequately secured, and that, on the journey, such precautions as ordinary prudence dictates were taken by the Company's servants. (*Ibid.*) (9 B. H. C. 1, *The Great Western Ry. Co. v. Blower*, 41 L. J. C. P. 268; 22 A. 361, R). P

(c) The burden of proof cannot be affected by the fact that the plaintiff had put forward a theory of his own to account for the accident. (*Ibid.*) (1 N. L. R. 4, F). Q

(12) Consignee's claim—Carrier's liability.

Where the consignees refused to take delivery of two bundles of cow-hides carried by the railway company on the ground of shortness in the number of pieces, and there was no evidence that the bundles had been broken or the hides counted by pieces, the railway company was declared not to be liable. 21 W.R. 350. R

77.¹ A person shall not be entitled to a refund of an overcharge¹ in respect of animals or goods² carried by railway, or to compensation for the loss, destruction, or deterioration³ of animals or goods delivered to be so carried, unless his claim to the refund or compensation has been preferred in writing by him or on his behalf to the railway administration within six months from the date of the delivery of the animals or goods, for carriage by railway⁴.

Notification of claims to refunds of overcharges and to compensation for losses.

Old Acts.

This section is new.

(Notes).

General.

(1) Section, nature of.

(a) S. 77 is plain. 31 B. 534 = 9 Bom. L.R. 942 (947). **S**

(b) It must be read in its plain and ordinary sense (*Ibid*). **T**

(2) Object of the section.

(a) The—apparently is to prevent stale claims. 27 B. 597 = 5 Bom. L.R. 531; 31 B. 534 = 9 Bom L.R. 942 (948). **U**

(b) “If it be said that the notice so served would probably be forwarded, and that redress should be facilitated, the answer is that experience of the Courts abundantly proved the necessity of protecting railways from groundless litigation, and the legislature has given the protection in question.” *Per Lord Campbell in Garton v. G.W.Ry. Co.*, 27 L.J. Ex. 375, cited at 4 Bom. L.R. 495 (503). **Y**

(3) Scope of section.

(a) This section precludes any person from maintaining a suit for a refund of an overcharge in respect of animals or goods unless the claim for a refund has been preferred in writing by him to the railway administration within six months from the date of the delivery of the goods, 28 A. 552 (553) = 3 A.L.J. 329 = A.W.N. (1906) 109; 35 C. 194 (196) = 12 C.W.N. 450. **W**

(b) All that this section requires is that the claim must be preferred in writing and within a limited time to the “Railway Administration.” 22 M. 137. **X**

(4) Effect of section.

The effect of S. 77 has been the subject of judicial interpretation in *Gunga Pershad v. The Agent, Bengal and North Western Railway Company*. (In the High Court of Judicature at Fort William in Bengal, Aug. 21, 1895, cited with approval in 26 B. 669 = 4 Bom. L.R. 495). **Y**

(5) Terms of section examined.

(a) This section requires that the claim should be preferred in writing by or on behalf of the person aggrieved, and that it should be so preferred to the Railway Administration within the prescribed period. 26 B. 669 = 4 Bom. L.R. 495. **Z**

General.—(Concluded).

- (b) When goods were taken from Raipur by the Bengal Nagpur Railway Co., and were conveyed through the lines of the East India Railway and delivered by a third railway to the Bengal North Western Railway at Ravilganj, a portion of the goods was damaged. A claim was made on the Bengal North Western Railway, and this was passed on to the Nagpur Railway, whose reply repudiating all liability was communicated to the plaintiff. The Nagpur Railway Company was not an original party but was subsequently added in the course of the trial. The lower Appellate Court held that no notice had been served on the Nagpur Railway Company as required by S. 77. The plaintiff appealed to the High Court. *Prunsep and Ghose, JJ.* said,

"It is contended that, although strictly within the terms of S. 77 no notice was served on the Nagpur Railway Co., still inasmuch as that Company had learnt of the claims made by the plaintiffs in respect of these goods and to some extent admitted liability on this receipt, it must be held that the claim and notice made on the North Western Railway was practically a claim and notice served on the Nagpur Railway Company." "It seems to us that this would be construing the law beyond the meaning and object of S. 77 of the Act, and indeed we may remark that this was not the case made by the plaintiffs. They had some intimation that the Bengal and North Western Railway Co. had made a communication with the Nagpur Railway Co., and, notwithstanding that, they have deliberately brought this suit after notice under S. 77 against only the Bengal and North Western Railway Company, seek to join the Nagpur Railway Company and hold them liable also with the Bengal and North Western Railway Company, and make the information given by the Bengal and North Western Ry. Co. to the Nagpur Railway Company on the claim made on the former a notice that the claim was made also on the latter company. We think that the subordinate Judge has rightly dismissed the claim against the Nagpur Railway Company holding that as no notice had been served on that Company, it could not be made a party to any suit." (*Ibid*). A

(6) Formalities imposed.

Those formalities which the Legislature has imposed cannot be dispensed with.
26 B. 669=4 Bom. L.R. 495 (503). B

(7) Knowledge by a railway company.

Under this section,—is of no avail, unless it be communicated to it in the prescribed mode. 26 B. 669=4 Bom. L. R. 495. C

1.—"Overcharge."**(1) Overcharge.**

In the American and English Encyclopædia "overcharge" is defined as "a charge of more than is permitted by law." See *Woodman v. Rio Grande*, 67 Tex. 418, cited in 9 Bom. L. R. 942 (947). D

(2) Consignment—Overcharge—Notice of claim.

- (a) The plaintiff sued defendant Railway Company to recover the excess amount claimed and received by the Company as carrier after the delivery of goods to the consignee. *Held*, that the notice prescribed by S. 77 of the Act was necessary. 31 B. 534=9 Bom. L.R. 1942. E

1.—“Overcharge.”—(Concluded).

- (b) The overcharge referred to in S. 77 is not confined in its meaning to an overcharge recovered before the delivery of the goods to the consignee at their destination. (*Ibid.*) F
- (c) “If a person goes to an office of a carrier and asks what a thing will be done for, and he is told by a clerk or servant who is transacting business that it will be done for a certain sum, the master can charge no more.” *Per Lord Tentherden, in Winkfield v. Packington, (1827), C. and P. 599, cited in 9 Bom. L.R. 942 (947).* G
- (d) If, before sending goods by a carrier, the sender applies at his wharf to know at what price certain goods will be carried, and he is told by a clerk who is doing the business there, 2s. 0d. per cwt. and on the faith of this he sends the goods, the carrier, cannot charge more; although it be proved that the carrier had previously ordered his clerks to charge all goods according to a printed book of rates in which 3s. 6d. per cwt. was set down for the goods of the sort in question. (*Ibid.*) H

2.—“In respect of animals or goods.”

The words—in this section are as wide as they can be. 9 Bom. L.R. 942 (948). I

3.—“Loss, destruction, or deterioration of goods.”

(1) Negligent misdelivery of goods—Liability.

- (a) An exemption or privilege is conferred by S. 77 of the Act, on a railway administration. 6 P.R. 1897. J, K
- (b) The section should be strictly limited in its operation to cases clearly falling within its terms. (*Ibid.*) L
- (c) A negligent misdelivery of goods by a Railway Company to a person other than the owner, is not such a “loss” of the said goods, within the meaning of the section, as will bar a suit by the owner, instituted more than 6 months thereafter, for damages for breach of contract to carry the goods and deliver them to him at destination, because a claim for compensation was not preferred in writing by him or on his behalf to the railway administration within 6 months from the date of delivery of the goods for carriage by railway. (*Ibid.*) M

(2) Suit for loss of goods left on railway premises.

No—is maintainable if a receipt be not obtained for them. 23 A. 367 *Shim v. The Great Northern Railway Company*, 14 C. B. 547, R. N

4.—“Unless.. railway.”

(1) Notices of action.

Though—are not to be construed with extreme strictness, there must be a substantial compliance with the terms of the Act by which they are prescribed. *Union Steamship Co. of Newzealand v. Melbourne Harbour Trust Commissioner*, (1884) 9 A.C. 365., cited in 26 B. 669 = 4 Bom. L. R. 495 (504). O

(2) Notice in the newspapers.

A—of the claim or an oral examination could not have sufficed. 26 B. 669 = 4 Bom. L. R. 495 (504). P

4.—“Unless....railway.”—(Continued).

(3) Notification of a claim.

(a) The — may be given either to the Railway administration as defined in S. 3, sub-s. (6), or in any of the modes mentioned in S. 140, *infra*. 28 A. 552 (558) = 3 A.L.J. 239 = A.W.N. (1906) 109. Q

(b) Railway administration, in the case of a Railway administered by a Railway Company (as the E. I. Railway is), means the Railway Company, and this expression includes any persons, whether incorporated or not, who are owners or lessees of a Railway or parties to an agreement for working a Railway (S. 3, Sub-Ss. 5 & 6). 26 B. 669 = 4 Bom. L.R. 495. R

(4) Claim for compensation for short delivery—Notice of claim on whom to be made—Service on Traffic Manager.

(a) The notice of a claim under section 77 of the Act must be served, under S. 140 of the Act, on the Agent of the Company. 13 C.W.N. 24 = 4 M. L.T. 427; 35 C. 194 = 12 C.W.N. 450 S

(b) But the law does not require that the notice should be physically thrust in the Agent's hand. (*Ibid*) T

(c) It is sufficient if it appears from the finding that the Agent has had full knowledge and notice of the claim. (*Ibid*) U

(d) Where from the rules of the Railway Company it appeared that the Traffic Manager in the claims department settles all such claims and the Agent also refers to him claims for disposal, held, that the notice to the Traffic Manager was sufficient. (*Ibid*). Y

(5) Service of notice on the General Traffic Manager.

The — of the Company is not sufficient service within the meaning of S. 140, *infra*. (22 M. 137, 24 C. 306, 26 B. 669 & 26 A. 207, F.) W

(6) Traffic Superintendent, not Manager's Agent.

The Traffic Superintendent should not be considered as the Manager's Agent. 24 C. 306. X

(7) Notice to Traffic Superintendent, nature of.

(a) Notice to the Traffic Superintendent is not sufficient compliance with S. 77 of the Railways Act. 24 C. 306. Y

(b) Such notice is not notice to the railway administration. (*Ibid*). Z

(8) Notice to Traffic Superintendent when becomes sufficient.

Where a suit was brought against the South Indian Railway Co. for the recovery of the value of a parcel delivered to them for carriage, and where it was found that within two months of delivery, notice of the suit to the Traffic Manager had been given by the plaintiff, that notice was held to be a good notice if in fact it reached the Agent of the Company within six months. 22 M. 137. A

(9) Notice of suit.

(a) Regard being had to the terms of this section, the defendant need not plead want of notice for availing himself of it. 24 C. 306. B

(b) The objection on the ground of want of notice may be raised at the hearing (*Ibid*). C

(c) The objection will be sufficiently met if it is shown that the notice served on the Traffic Superintendent reached the Manager within six months from the date of the delivery of the goods. (*Ibid*). D

4.—“ Unless . . . railway.”—(Continued).

(10) Notice, plea of absence of, when may be taken.

The objection on the ground of want of notice under this section need not necessarily be taken by the defendant in his written statement, but, it is sufficient if raised in argument at the hearing. 24 C. 306. E

(11) Notice—Second appeal—Plea of want of notice whether allowable.

A plea of failure to give notice under this section, urged for the first time in second appeal and not supported by any evidence that such notice was not given, was held to be taken too late. 27 B. 597=5 Bom. L.R. 531. F

(12) Service on Railway Company.

For the purpose of summons, a railway company must be deemed to dwell at its principal office. 1 Hyde 197. G

(13) Suit against Railway Company—Notice of claim—Notice to be given to the company which it is intended to sue.

See 26 A. 207=A.W.N. (1903) 235, under S. 80, *infra*. H

(14) Consignment of goods—Short delivery—Claim, notice of—Written notice—Claim on Company, liable.

In May 1890, H. delivered to the E. I. Ry. Co. at Gazibad 1500 bags of wheat for carriage to Bombay. The railway receipts for the consignment were sent to plaintiffs by H who drew *hundis* against the receipts. The plaintiffs accepted and in due course paid the *hundis*. On presentation of the receipts at Bombay, the B.B. and C.I. Ry. Co., delivered 875 bags only and granted certificate of short delivery respecting the rest. On the 25th July 1898, plaintiffs wrote to B.B. and C. I. Ry. Co., asking for damages for short delivery. On the 22nd September 1898, the Ry. Co., wrote to the plaintiffs saying the company was advised by the East India Ry. Co., to repudiate the claim and desiring plaintiffs to address further correspondence to the latter Ry. Co. As a result of further correspondence, the B. B. and C. I. Ry. Co. on the 27th Oct. 1898 wrote to plaintiffs intimating that the E.I.R. Co. repudiated their claim. The plaintiffs did not write directly to the E. I. R. Co., and it was not alleged that a claim was ever preferred by them or on their behalf to the E. I. R. administration. Plaintiffs ultimately filed a suit to recover damages for short delivery. *Held*, that the suit was barred by this section, as no claim on the E. I. R. administration was preferred in writing by plaintiffs, nor did the plaintiffs intend that the claim preferred by them to the B.B. and C.I.R. Co. should either be preferred by that company on E. I. R. Co., or be treated as a claim on the G. I. Ry. Co. 26 B. 669=4 Bom. L.R. 495. I

(15) Diversion of consignment while on route—Delivery to original consignee—Liability of company.

At Sakrigali Ghat Station on the East India Railway, G booked a consignment addressed to R at Kampti on the Bengal Nagpur Railway. While the consignment was *enroute* to Kampti, G requested the railway servants at Sakrigali Ghat Station to direct the consignment to plaintiff at Nargaon Station. This diversion was duly communicated to the Station Master at Kampti who in spite of the instructions delivered the consignment to R. The plaintiff sued the East India Railway for

4.—“*Unless....railway.*”—(Concluded).

damages consequent on non-delivery of consignment to him. *Held*,
(1) that the Railway Company was liable in damages: the case was a simple case of breach of contract; (2) that the liability of the Ry. Co. was not affected by the fact that the Station Master at Kamphi acted wrongly in disregarding the instruction which he received from Sakrigali Ghat station. 27 B. 597 = 5 Bom. L.R. 531. J

(Miscellaneous.)

(1) **Suit against a railway company—Law to be applied.**

In cases for which native law does not provide, reference may be made to the law of civilised nations. Oudh Old S. C. 4. K.

(2) **Limitation of suit for loss of, or damage to, or non-delivery of goods.**

See cases noted under “Responsibility of railway administration as carriers,” *supra*. L

78. Notwithstanding anything in the foregoing provisions of

Exoneration from responsibility in case of goods falsely described.

this chapter, a railway administration shall not be responsible for the loss, destruction, or deterioration of any goods with respect to the description of which an account materially false has been

delivered under sub-section (1) of section 58 if the loss, destruction, or deterioration is in any way brought about by the false account, nor in any case for an amount exceeding the value of the goods if such value were calculated in accordance with the description contained in the false account ¹.

Old Acts.

This section is new.

(Notes).

1.—“*Nor in any case...account.*”

Misdescription of goods—Liability of Company for loss.

(a) Where at the time of the consignment, goods of one kind, for which a higher rate of freight would have to be paid were represented to be goods of another kind for which a smaller freight was payable, and such goods were lost in transit by reason of a fire, it was held that the Railway Company was bound to prove want of negligence on its part and that the plaintiff was entitled to compensation, as if the lost goods were of the kind represented at the time of the consignment. 3 B. 120. M

(b) The Railway Company ought not to charge freight as for goods, to which a higher rate of freight would have to be paid. (*Ibid*). N

79. Where an officer, soldier, or follower, while being or

Settlement of compensation for injuries to officers, soldiers, and followers on duty.

travelling as such on duty upon a railway belonging to, and worked by, the Government, loses his life, or receives any personal injury in such circumstances that, if he were not an officer, soldier, or follower being or travelling as such on

duty upon the railway, compensation would be payable under Act

No. XIII of 1855¹, or to him, as the case may be, the form and amount of the compensation to be made in respect of the loss of his life or his injury shall, where there is any provision in this behalf in the military regulations to which he was immediately before his death, or is, subject, be determined in accordance with those regulations, and not otherwise.

Old Acts.

This section is new.

(Notes).

1.—“If he were not an officer....Act XIII of 1855.”

* N.B.—See notes under S. 59. See also cases noted under “Carriage of Passengers.”

(1) Act XIII of 1855.

- (a)—corresponds with Lord Campbell's Act (9 and 10, Vict. C. 93). O
- (b) That Act is intitled “An Act to provide compensation to families for loss occasioned by the death of a person caused by actionable wrong.” P
See 7 B.H.C.O C. 113 (115).

(2) Scope of the statute (9 and 10 Vic. C. 93).

- (a) The statute does not create a new cause of action. (See Browne on Railway Companies, p. 346.) Q
- (b) Hence, if the deceased has done anything which would have prevented him from bringing an action in his lifetime, no action can be brought after his death. (*Ibid.*) R

(3) Contributory negligence.

So,—on the deceased's part answers to an action by his representatives under the English Statute, *Manby v. St. Helen's Canal and Ry. Co.*, 27 L. J. Ex. 164. S

(4) Satisfaction.

Therefore, on a person injured accepting a sum of money in full—of all claims and causes of action against the Company, his right of action is gone, and his death does not create a fresh cause of action. *Read v. Gt. E. Ry. Co.*, 1. R. 3 Q. B. 555. T

(5) Action to be for benefit of certain relations, and to be brought by, and in name, of executor or administrator of deceased.

(a) ILLEGITIMATE CHILD.

- (i) The word ‘child’ is, in the English Statute, 9 and 10, Vict. C. 93, defined in the same way as in Act XIII of 1855, and has been held to mean a legitimate child. 7 B. H. C. O. C. 113 (115). U
- (ii) Accordingly, where the mother of a woman who was killed brought, as administratrix, an action on behalf of herself and her deceased daughter's illegitimate child, damages were given to the plaintiff on her own account only, and none for the illegitimate child. (*Ibid.*) *Dickinson v. The North Eastern Ry. Co.*, 33 L. J. Ex. 91. Y
- (iii) But it may be on behalf of a child *en ventre* at the time of the death and subsequently born. *The George v. Richard*, 3 A. and E. 466. W

1.—“If he were not an officer.... Act XIII of 1855”—(Continued).

- (iv) A son adopted by the widow of the deceased being the legal representative of the deceased, can maintain a suit for the benefit of the persons, if any, entitled to compensation for the injury occasioned to them by the death of the deceased against those whose negligence caused such death. 7 B.H.C. (O.C.) 118. **X**

(b) PECUNIARY ADVANTAGE.

- (i) For maintaining an action, the persons on whose account the action is filed are bound to prove that, during the life-time of the deceased, a—accrued to them owing to their relationship with him. *Sykes v. N.E. Ry. Co.*, 44 L.J.C.P. 191. **Y**

- (ii) The action is maintainable though there may be no loss of property, if the effect of the death is to bring about a different distribution of the property among the family of the deceased. *Pym v. Gt. N. Ry. Co.*, 32 L.J.Q.B. 377. **Z**

(c) MEASURE OF DAMAGES.

- (i) In S.B.H.C.R. (O.C.) 130, the question of the—to be given to the family of a person whose death has been caused by wrongful act, neglect or default was considered. **A**

- (ii) For a case where a claim for damages on account of injuries in a collision was allowed; see *Elaht Buksh v. The Secretary of State for India in Council*, decided by the Punjab Chief Court on the 26th Feb. 1895. **B**

- (iii) The legal liability of the person killed to the persons on whose behalf the action is brought is not the—. *Dalton v. S.E. Ry. Co.*, 27 L.J.C.P. 227. **C**

- (iv) The reasonable expectation of pecuniary advantage for the relative, if he had remained alive, may be taken into account. (*Ibid*). **D**

- (v) There must be actual pecuniary loss to the persons on whose behalf the action is brought. (See *Browne on Railway Companies*, p. 347.) **E**

(d) EARNINGS OF A CHILD.

But loss of the small weekly—living with its parents is sufficient, if it is not shown that the cost of maintenance is larger than the earnings. *Condon v. Gt. S. and W. Ry. Co.*, 16 Ir. C. L. 415. **F**

(e) LOSS OF THE SON'S SERVICE.

- (i) Where a son works for his father, receiving the full wages of a workman, the—is not such damage as will entitle the father to maintain an action. *Sykes v. N. E. Ry. Co.*, 44 L.J.C.P. 191. **G**

- (ii) But the case is quite different if the son works for the father for nothing. *Franklin v. S. E. Ry. Co.*, 4 C.B.N.S. 296. **H**

(f) FUTURE ADVANTAGE.

Where the son is being brought up with a view to follow his father's business, but has not as yet been of any service to him, no damages can be given in respect of the probability that the father would, if the son had lived, have derived advantage from him. *Bourke v. Cork and Macroom Ry. Co.*, 4 L.R.Ir. 682. **I**

1.—*If he were not an officer.... Act XIII of 1855*—(Concluded).

(g) HOW DAMAGES ASSESSED.

Semple: The jury should not be directed to give damages to the full amount of a perfect compensation for the pecuniary injury, but they should take a reasonable view of the case and give what they consider, under all the circumstances, a fair compensation. *Rowby v. L. and N. W. Ry. Co.*, 42 L. J. Ex. 153. J

(h) CONSOLATION.

Damages can only be given for actual pecuniary injury and not by way of—. *Blake v. Midland Ry. Co.*, 18 Q.B. 93. K

(i) FUNERAL EXPENSES.

Nor can damages be given for—or mourning. *Dalton v. S. E. Ry. Co.*, 27 L. J.C.P. 227. L

(j) POLICY MONIES DEDUCTED.

A sum receivable by the persons on whose behalf the action is brought by reason of the death must be deducted in estimating the damages. *Hicks v. Newport, etc. Ry. Co.*, 4 B. and S. 403. M

• 80. Notwithstanding anything in any agreement purporting

Suits for compensation for injury to through-booked traffic 1.

to limit the liability of a railway administration with respect to traffic while on the railway of another administration, a suit for compensation for loss of the life of, or personal injury to a passenger, or for loss, destruction, or deterioration of animals or goods, where the passenger was or the animals or goods were booked through over the railways of two or more railway administrations, may be brought either against the railway administration from which the passenger obtained his pass or purchased his ticket, or to which the animals or goods were delivered by the consignor thereof, as the case may be, or against the railway administration on whose railway the loss, injury, destruction, or deterioration occurred.

Old Acts.

This section is now.

(Notes).

N B.—For further notes, see notes under “Carriage of Passengers,” *supra*.

1.—“Suits for compensation....traffic.”

(1) Secretary of State to be sued as defendant in a suit against State Railway.

(a) The definition of “railway administration” given in this Act suggests that the framers of the Act contemplated that a suit in which compensation is claimed under this chapter of the Act must, where the railway is administered by the Government, be brought against the Government. 4 O.C. 143 (136). N

(b) There is nothing in S. 80 of the Act which suggests that in such a case the suit should be brought against the manager. (*Ibid.*) O

1.—“Suits for compensation . . . traffic ”—(Continued).

- (c) This section merely enacts that a suit for compensation for loss of goods or other injury, in the case of a through-booked traffic, may be brought equally against the booking administration and against the administration on whose railway the loss occurred (*Ibid.*) **P**
- (d) Where, therefore, in the case of a railway administered by the Government, a person wishes to sue the administration for loss of goods or other injury, he should bring the suit against the Government, that is to say, against the Secretary of State for India in Council. (*Ibid.*) **Q**
- (e) The Traffic Superintendent, in a suit against a State Railway, ought not to be sued. (*Ibid.*) **R.**
- (f) Such a suit will not lie as against the Secretary of State, nor can the plaintiff be permitted to amend his suit by substituting the Secretary of State for the Traffic Superintendent, until the notice required by S. 424, C.P.C., 1882 (=S. 60, Act V of 1908) is given. (*Ibid.*) **S**

(2) Contract with Railway Company—Delivery at station on another railway agency.

- (a) A contract by a Railway Company to take a consignment of goods and deliver them at a station on some other railway, does not in itself constitute the former Company an agent for the latter. 3 M. 240 (*Followed* in 29 A. 242 = 4 A.L.J. 80 = A.W.N. (1907) 21 = 2 M.L.T. 42). **T**
- (b) The defendant Company had entered into a very complicated convention with another Railway Company, not only for a full and complete system of interchange of traffic, but that the two Companies should aid and assist each other in every possible way as if the whole concerns of both Companies were amalgamated, and that every possible facility should be given by either party to develop and increase the traffic of both. Except for purposes of repairs, the stock was to be considered as one stock. A joint board of directors was to have charge of the working of the agreement. *Held*, that the forwarding Company became the agents of the delivering Company by virtue of this agreement. *Gill v. The Manchester, Sheffield and Lancashire Ry Co.*, L.R. 2 Q.B. 186, cited in 3 M. 240 (244). **U**

(3) Principal and Agent—Receiving and delivering Companies, relation between—Liability of receiving Company—Excess charged by the delivering Company.

- (a) When a Railway Company receives and undertakes to carry goods from a station on its railway to a place on another distinct railway with which it communicates, this is evidence of contract with the receiving Company for the whole distance, and the other Railway Company will be regarded as its agent and not as contracting with the bailor. 29 A. 228 (F.B.) = A.W.N. (1907) 21 = 4 A.L.J. 80 = 2 M.L.T. 42. (*Muschamp v. Lancaster Ry Co.*, 8 M. and W. 421; *Webber v. Great Western Railway*, H. and C. 771; 3 M. 240, F.). **V**
- (b) When two Railway Companies interchanged traffic, goods and passengers, with through-tickets, rates and invoices, payment being made at either end, and profits were shared by mileage, the receiving Company, by granting the receipt-note for the goods to be carried over and delivered at a station of the delivering Company's line, does not thereby contract with the consignor of the goods as agent of the delivering Company. 3 M. 240. **W**

§ 1.—“Suits for compensation....traffic”—(Continued).

(c) The contract with the receiving^a Company was held to be one and entire. (Ibid.) X

(d) Receipt note given by a Railway Company for goods to be sent to a place on another railway and there to be delivered for one entire sum, is one entire contract for the whole distance, and constitutes an entire contract with the railway which gave the receipt note. 29 A. 228 (F.B.) = A.W.N. (1907) 21 = 4 A.L.J. 80 = 2 M.L.T. 42. Y

(4) Agreement for traffic between two companies. •

A written agreement in respect of traffic arrangements between two Railway Companies may not constitute a partnership between them, but it may render the second Company agents of the first, so that a suit may be rightly brought against the former for non-delivery owing to the loss of the goods 5 B. 371. (*Gill v. Manchester, Sheffield, and Lancashire Ry. Co.*, L.R. 8 Q.B. 186, F.). Z

(5) Receiving and delivering companies—Alteration of contract.

The Nizam's State Railway Company received certain goods to be delivered to the plaintiffs at Agra station through the Great Indian Peninsula Railway Company, and received a certain amount for the waggons load. At Agra, the Great Indian Peninsula Railway Company refused to deliver the goods unless a further amount was paid at maund rate. The plaintiffs paid the amount under protest and brought a suit for recovery of the amount against both the Railway Companies.

Held, that (i) the Nizam's State Railway Company being the principal and the Great Indian Peninsula Railway Company being its agents, the former was liable in damages to the plaintiffs. 29 A. 228 (F.B.) = 4 A.L.J. 60 = A.W.N. (1907) 21 = 2 M.L.T. 42; and A, B

(ii) that the Railway Company was not competent to alter the contract between the parties and change for maund rate instead of waggon rate as settled. (Ibid.) C

(6) Injury to through-booked traffic, suit for compensation for—Short delivery.

(a) Where railway receipts are granted by one Railway Company for the consignment of goods to be delivered at a station on another railway, the latter Company cannot be held responsible for short delivery, when it is not shown that the goods were lost on its line, unless it is proved that the former Railway Company acted either as partners or agents of the latter in issuing tickets. 8 Bom. L.R. 360. D

(b) The mere fact of the Companies being in the habit of issuing tickets and receipts, does not make them partners or agents. (Ibid.) E

(7) Breach of contract—Non-delivery of goods—Place of cause of action.

(a) An action for breach of contract may be brought either in the place where the contract is made or in the place of its performance, and, in either case, the cause of action arises wholly. 1 M. 375. F

(b) Cl. 12 of the Letters Patent gives to the High Court jurisdiction, if the cause of action has arisen either wholly, or, if leave has been first obtained, in part within the local limits of its ordinary original civil jurisdiction. (Ibid.) G

(c) Where the defendant Company at Cawnpur had received goods to be delivered at Madras, a suit for the non-delivery of the goods was rightly instituted in the Madras High Court, the cause of action, namely, the failure to deliver, having arisen entirely within its original Civil jurisdiction. (Ibid.) H

1.—“*Suits for compensation....traffic*”—(Continued). •(8) **Ss. 77 and 80—Suit against Railway Company—Notice of claim to be given to Company which it is intended to sue.**

(a) Under S. 80 of the Act, when goods are booked through over the lines of two or more railway administrations and are lost or damaged in transit, it is at the option of the person damaged to sue either the railway administration to which the goods were delivered by the consignor, or the railway administration on whose line the loss occurred. 26 A. 207. I

(b) But under S. 77 of the Act, it is a condition precedent to the bringing of such suit, that notice of the plaintiff's claims must be given within six months from the date of delivery of the goods for carriage to the railway administration which the plaintiff seeks to render liable. (*Ibid.*) J

(c) In default of such notice, the plaintiff will not be entitled to a decree against the defendant Company. 26 A. 207 = A.W.N. (1903), p. 235. K

(9) **Successive carriers—Remedy on loss against both.**

Where the consignor had entrusted goods to one Company and the goods were delivered at a station belonging to another Company, a suit for non-delivery instituted against the latter Company should not be summarily dismissed because, from the mere fact that the plaintiff might have a remedy against the former Company, it would, by no means, at once follow that he can have none against the latter Company as well 17 W.R. 240 (242). Held, however, when the case subsequently came on to the High Court after remand, that it was quite open to the Court of first instance to find, as a question of fact, if he thought it proper upon the evidence, that there was no privity of contract between the plaintiff and the latter Company. 18 W.R. 145. L

(10) **Liability of contracting Company for negligence of a second Company.**

(a) Where the Company issues a ticket to a particular station and a part of the journey has to be performed over the lines of another Company, whether under an agreement for participation of profits or under running powers, the first Company is liable for an injury arising from the negligence of the second Company in any matter incidental to the carriage of passengers. *Gt. W. Ry. Co. v. Blake*, 7 H. & N. 987. M

(b) Or the rule may, perhaps, be put in this way: a Company agreeing to carry a passenger over the line of a second Company is liable for all such negligence of the second Company as it would have been liable if the line of the second Company had been its own. See *Browne on Railway Companies*, p. 304. N

(c) The liability of the first Company in such cases has been doubted, but the rule as above stated has been approved by the House of Lords in *Daniel v. Metr. Ry. Co.*, L.R. 5 H.L. 45. O

Illustration of the rule.

(Company A is referred to as the Company issuing the ticket).

- (i) Company A runs over the line of Company B; company B negligently leaves a carriage on the line. Company A is liable. *Gt. W. Ry. Co. v. Blake*, 7 H & N, 987. P

¶ 1.—“*Suits for compensation....traffic*”—(Concluded).

- (ii) Company B negligently allows cattle to stray on the line. Company A is liable. *Buxton v. N. E. Ry. Co.*, L.R. 8 Q.B. 47. Q
- (iii) Company B negligently allows the train of Company A to proceed before the line is clear. Company A is liable. *Thomas v. Rhymney Ry. Co.*, L.R. 6 Q.B. 266. R
- (iv) A fortiori, the contracting Company is liable if it neglects any precaution it ought to have taken to make the line of the second Company safe. *Birkett v. Whitelane Junction Ry. Co.*, 4 H. & N. 730. S

(11) **Liability for negligence of others not connected with carriage of passenger.**

But a Company carrying passengers is not liable for the negligence of others, of whom they have no control, in a matter altogether extraneous to the carriage of passengers. See *Browne on Railway Companies*, p. 305. T

• *Illustration.*

- Company B has running powers over the line of Company A. Company B, in disobedience of signal at the junction, runs into a train of Company A, which is proceeding on the line of Company A. Company A is not liable. *Wright v. Mid. Ry. Co.*, L.R. 8 Ex. 137. U

81. [Limitation of liability of railway administration in respect of traffic on inland waters by vessel not being part of railway.]

Repealed by the Indian Railways Act (1890) Amendment Act, 1896 (IX of 1896), Section 5. V

82. (1) When a railway administration contracts to carry pas-

Limitation of liability of railway administration in respect of accidents at sea.

sengers, animals, or goods partly by railway and partly by sea ¹, a condition exempting the railway administration from responsibility for any loss of life, personal injury, or loss of or damage to animals or goods, which may happen, during the carriage by sea, from the act of God ², the King's enemies ³, fire, accidents from machinery, boilers, and steam, and all and every other dangers and accidents of the seas ⁴, rivers, and navigation of whatever nature and kind soever, shall, without being expressed, be deemed to be part of the contract, and, subject to that condition, the railway administration shall, irrespective of the nationality or ownership of the ship used for the carriage by sea, be responsible for any loss of life, personal injury, or loss of or damage to animals or goods, which may happen during the carriage by sea, to the extent to which it would be responsible under the Merchant Shipping Act, 1854, and the Merchant Shipping Act Amendment Act, 1862, if the ship were registered under the former of those Acts, and the railway administration were owner of the ship, and not to any greater extent.

(2) The burden of proving that any such loss, injury, or damage as is mentioned in sub-section (1), happened during the carriage by sea, shall lie on the railway administration.

Old Acts.

Act IV of 1879 }
 „ XVIII of 1854 } No corresponding provision.

(Notes).

Analógous provisions.

Cf. S. 14, the Regulation of Railways Act, 1868 (31 & 32, Vict. C. 119); and
 S. 12, the Regulation of Railways Act, 1871 (34 & 35, Vict. C. 78)

Y1

1.—“Partly by railway and partly by sea.”

Ss. 3, 8, 9, Act III of 1865—Contract to carry partly by steamer and partly by rail—Omissions of consignor to declare value and description of goods.

(a) Where through-booking first by steamer and then by rail or *vice versa* is made for the convenience of the public, and when the journey is performed partly in steamers of one Company and partly in trains of another, and the charges creditable to each are subsequently adjusted, the contract is divisible so far as the two portions of the journey are concerned. 34 C. 419=11 C.W.N. 1071 (11 C.W.N. 1076, F.). W

(b) Where a consignor failed to declare the value and description of the goods as required under the provisions of the Carrier's Act and the Railways Act, and sued the steamer Company for damages for loss of the goods so carried partly by steamer and partly by rail, *held* that, so far as the journey was by river, the steamer was entitled to claim, as regards the acts of its agents and servants, the protection afforded by the provisions of the Carrier's Act, and, so far as the journey was by rail, the Railway Company was similarly entitled to claim the protection afforded by the Railways Act. (*Ibid.*) *Le conteur v. The London and S. M. Ry. Co.*, 1 Q. B. 54; *Baraudale v. The Great Eastern Ry. Co.*, 38 L. J. Q. B. 137, R. X

2.—“Act of God.”

Act of God, what is an.

(a) The legal meaning of the phrase,—is clearly defined in *Nugent v. Smith*, L.R. 1 C.P.D. 423, cited in 18 C. 427 (443). Y

(b) The words designate the immediate operation of purely natural agents, such as lightning, earthquake, and tempest, exclusive altogether of human interventions, and not so expansive as to comprehend what is merely inevitable. (*McLachlan on Shipping*, 2nd Ed. 409. referred to in 18 C. 427 (435). Z

(c) To be an act of God, an event must be one, the happening of which could not have been reasonably expected, the fact that the event has happened before, is only evidence to show that its recurrence might have been expected. *Nitrophosphate and Odam's Chemical Manure Co v. London and St. Katherine Dock Co.*, 9 Ch. D. 503. A

2.—“Act of God.”—(Concluded).

(d) In *Smith v. Shepherd* (referral to in Abbot on Shipping, 11th Edition, pp. 338-39), it was held that the act of God which could excuse the carrier must be immediate and not remote. [See 18 C. 427 (430). B

(e) The act of God, which excuses a carrier, must be a direct and violent act of nature. 18 C. 427 (437). C

3.—“King’s enemies.”

“King’s enemies,” meaning of.

Semle:—When the expression “King’s enemies” appears in a “bill of lading,” it means the enemies of the Sovereign of the person who made the bill of lading *Russell v. Nieman*, 17 C.B. (N. S.) 163. D

4.—“Accidents of the seas.”

(1) Cases where ship-owner held liable.

(a) Damage done to goods by rats (even though the ship owner has taken every precaution). *Laverom v. Drury*, 8 Ex. 166. E

(b) Damage caused by bad stowage and want of ventilation. *The Freedom*, L.R. 3 P.C. 594. F

(c) Damage to cargo by sea water, caused by the crew boring holes through the sides of the ship in order to settle her. *The Chasea*, L.R. 4 A. and E. 446. G

(2) Cases where ship-owner held not liable.

(a) Damage by the escapement of sea-water (such escapement being due to the rats gnawing a hole in a pipe). *Hamilton v. Puradof*, L.R. 12 App. Cas. 518. H

(b) Damage caused by want of ventilation. Such want of ventilation being due to the necessary closing of the ventilators during a storm of exceptional severity and duration. *The Thrumscoe*, 66 L. J. Adm. 172. I

(c) Non-delivery of goods due to foundering caused by collision, if it occurs without fault in the carrying ship. *Wilson v. Owners of Xantho*, L.R. 12 App. Cas. 503. J

CHAPTER VIII.

ACCIDENTS.

Report of railway accidents 1. 83. When any of the following accidents occurs in the course of working a railway 2, namely:—

(a) any accident attended with loss of human life, or with grievous hurt³ as defined in the Indian Penal Code³, or with serious injury to property;

(b) any collision between trains of which one is a train carrying passengers;

(c) the derailment of any train carrying passengers, or of any part of such a train;

- (d) any accident of a description usually attended with loss of human life, or withⁿ such grievous hurt as aforesaid, or with serious injury to property ;
- (e) any accident of any other description which the Governor-General in Council may notify in this behalf in the *Gazette of India* ;

the railway administration working the railway, and, if the accident happens to a train belonging to any other railway administration, the other railway administration also, shall, without unnecessary delay, send notice⁴ of the accident to the Local Government, and to the Inspector appointed⁵ for the railway ; and the station-master nearest to the place at which the accident occurred, or, where there is no station-master, the railway servant in charge of the section of the railway on which the accident occurred, shall, without unnecessary delay, give notice of the accident to the Magistrate of the district in which the accident occurred, and to the officer in charge of the police-station within the local limits of which it occurred, or to such other Magistrate and police-officer as the Governor-General in Council appoints in this behalf.

Old Acts.

Act IV of 1879.. ..S. 6.

Act XVIII of 1854.. ..S. 41.

(Notes.)

Analogous provision.

(Cf. S. 6, the Regulation of Railways Act, 1871 (34 and 35 Vic , C. 78). K

1.—“Report of railway accidents.”

(1) Report of accidents.

For—on E. I. and I. M. Rys. in Central Provinces, see Cent. Provs. Local R. & O. L

(2) Inquests on Railway accidents—Procedure.

Special rules have been issued for inquests on deaths resulting from railway accidents. The station-master nearest to the place where such an accident may have taken place, or, if there be no station-master, the railway servant in charge of the section of the railway, is required, without unnecessary delay, to give notice of the accident (a) to the Magistrate of the District, (b) to the Officer in Charge of the police station in the jurisdiction of which the accident occurred, or to such other Magistrate or police officer as the Governor-General in Council may appoint in this behalf. (See Section 1 M

1.—“*Report of railway accidents.*”(3) **Information required by the section.**

The— is to be given in writing or by telegraph if possible. (Mad. Gaz., 1889, Pt. I, p. 336.) N

(4) **Punishment for neglect to give such information.**

S. 108, *infra*, declares the—. O

(5) **Who to be present at enquiry.**

The Superintendent of the Railway Police, or, in his unavoidable absence, an officer of police should be present at the enquiry. (Mad. Gaz., 1889, Pt. I, p. 336.) P

(6) **Investigation held by whom.**

An investigation may be held by the Railway Police, or, where there is no railway police, by the District Police. (*Ibid.*) Q

(7) **Inability of District Superintendent of Railway Police to hold the investigation—Procedure.**

In case of—, it shall be held by a subordinate officer, who, in the case of the District Police, would be an Assistant Superintendent of Police. (*Ibid.*) R

(8) **Railway Police and the District Police are both present.**

If the—, the latter shall carry on any investigation that may be necessary beyond the limits of the premises of the Railway. (*Ibid.*) S

(9) **Personal injuries—Action against a Railway Company.**

Where an action is brought against a Railway Company for personal injuries, etc., the official reports of accidents are not privileged from inspection. *Wolley v. North London Ry. Co.*, L.R. 4 C.P. 602. T

2.—“*When any... railway.*”**Digging of a ballast by a Railway Company.**

According to S. 6 of the Regulation of Railways Act, 1871, the— upon its own premises for railway purposes is not an act done in the course of working any railway. *Scott Mid. Ry. Co.*, 70 L.J. K.B. 228. U

3.—“*Grievous hurt... Penal Code.*”**Grievous hurt.**

The following kinds of hurt only are designated as “grievous”.—

First.—Emasculation.

Secondly.—Permanent privation of the sight of either eye.

Thirdly.—Permanent privation of the hearing of either ear.

Fourthly.—Privation of any member or joint.

Fifthly.—Destruction or permanent impairing of the powers of any member or joint.

Sixthly.—Permanent disfiguration of the head or face.

Seventhly.—Fracture or dislocation of a bone or tooth.

Eighthly.—Any hurt which endangers life, or which causes, the sufferer to be, during the space of 20 days, in severe bodily pain, unable to follow his ordinary pursuits. (See S. 320, I.P.C.) Y

4.—“*Send notice.*”

Notice.

For such—, see Supplement to Assam, R.M.

W

5.—“*Inspector appointed.*”

Notification appointing the Commissioner of Police, Madras.

For—, to receive reports of all railway accidents happening within the limits of the town of Madras, see Mad. R. and O., Vol. I.

X

84. The Governor-General in Council may make rules, consistent with this Act and any other enactment for the time being in force, for all or any of the following purposes, namely:—

Power to make rules regarding notices of and inquiries into accidents.

- (a) for prescribing the forms of the notices mentioned in the last foregoing section, and the particulars of the accident which those notices are to contain;
- (b) for prescribing the class of accidents of which notice is to be sent by telegraph immediately after the accident has occurred;
- (c) for prescribing the duties of railway servants, police-officers, Inspectors, and Magistrates on the occurrence of an accident.

Old Act.

This section is new.

(Notes).

1.—“*Power to make rules....accidents.*”

RULES FOR ENQUIRING INTO, AND REPORTING ON, SERIOUS ACCIDENTS ON INDIAN RAILWAYS.

[N.B.—See, Enclosure No. I to Government of India Circular No. III, Railway, dated 14th Feb. 1902, published under Government of India Notification, No. 81, dated 7th March 1902.]

The following rules regarding notices of accidents occurring in the course of working a railway and the duties of railway servants, Police officers, Government Inspectors and Magistrates on the occurrence of such accidents, framed by the Governor-General in Council in exercise of the powers conferred by S. 84 of the Indian Railways Act, 1890, are to be closely observed.—

(1) General.

- (a) Serious accidents are accidents attended with loss of human life, or serious injury to person or property, or accidents of a description usually attended with such loss or injury.
- (b) In the case of any Railway passing through Native States, the Government of India will, from time to time, direct what official shall, for the purposes of these rules, be regarded as the Magistrate of the District in respect of the portion of the railway situate in each such State.

Y

Z

1.—“Power to make rules....accidents” —(Continued).

RULES FOR ENQUIRING INTO, AND REPORTING ON, SERIOUS ACCIDENTS ON INDIAN RAILWAYS—(Contd.).

- (c) Throughout these rules, the words, “*District Superintendent of Police*” of the District in which the occurrence takes place, shall be substituted for the words “*Railway Police Superintendent*,” in respect of railways whereon a Railway Police Superintendentship has not been established.

The word “*Manager*” shall include the agent of a guaranteed or other Railway Company or other officer in charge, and the Chairman of the Corporation in the case of Calcutta Municipal Railway, and the Vice-Chairman of the Calcutta Port Commissioners in the case of Railways belonging to that body, and also the Chief Engineer or Engineer-in-Chief or other officer in Charge of any railway.

The officer authorised by Government to investigate and report on accidents is called the “*Government Inspector*,” and his address and official designation will be notified to Managers from time to time by Local Governments or Administrations or by the Government of India. **A**

(2) notices.

The notices mentioned in S. 83 of the Indian Railways Act, 1890, shall contain the following particulars, namely —

- (a) Mileage at which the accident occurred and the name of the station nearest to the spot.
- (b) Time and date of the accident, and the number and description of the train or trains.
- (c) Nature of the accident, and the number of people killed or injured, as far as known.
- (d) Cause of the accident, as far as known.
- (e) Probable detention to traffic. **B**

In the case of the following accidents, namely. —

- (a) Accident attended with loss of human life, or with serious injury to persons or property, or (b) collisions between trains of which one is a train carrying passengers, or (c) the derailment of any train, carrying passengers, or any part of such train, such notices shall be sent by telegraph, immediately after the accident has occurred **C**

N.B.—Notices of accidents described in S. 83 of the Indian Railways Act, 1890, and not falling under this rule, must, in accordance with that section, be given without unnecessary delay, and may be sent by post.

(3) Duties of Railway servants.

Every railway servant shall report, with as little delay as possible, every accident occurring in the course of working the railway on which he is employed which may come to his notice. Such reports shall be made to the nearest station-master, or where there is no station-master, to the railway servant in charge of the section of the railway on which the accident has occurred. **D**

1.—“Power to make rules....accidents”—(Continued).

RULES FOR ENQUIRING INTO, AND REPORTING ON,
SERIOUS ACCIDENTS ON INDIAN RAILWAYS—(Contd.).

(4) Departmental enquiry.

- (i) Whenever an accident such as is described in S 83 of the Indian Railways Act, 1890, has occurred in the course of working a railway, the Agent or Manager shall cause a departmental enquiry to be promptly made by a railway servant for the thorough investigation of the causes which led to the accident.—

Provided that such enquiry may be dispensed with—

- (a) if the accident has not been attended with loss of human life or with serious injury to persons or property ; E
 (b) if there is no reasonable doubt as to the cause of the accident ; and, F
 (c) if one department of the railway intimates that it accepts all responsibility on the matter. G
- (ii) Where a Departmental enquiry is dispensed with, it shall be the duty of the Heads of Departments of the railway to make such enquiry as they may consider necessary if their staff or their system of working is concerned, and to adopt or suggest such measures as they may consider expedient for preventing a recurrence of similar accidents. H

(5) Notice of departmental enquiry.

- (1) Whenever a departmental enquiry is to be made, the Agent or Manager shall cause notice of the date and hour at which the enquiry will commence to be given to the following officers, namely —(a) the Magistrate of the District in which the accident occurred, or such other officer as the Local Government may appoint in this behalf. I
 (b) the Government Inspector appointed under S. 4, Sub-S. (1) of the Indian Railways Act, 1890, for the section of the Railway on which the accident occurred ; J
 (c) the Consulting Engineer in administrative charge of the railway, and when that officer is not the Government Inspector referred to in clause (b), the officer in charge of the Railway Police, or, if there are no Railway Police, the officer in charge of the Police Station in the jurisdiction of which the accident occurred. K
- (2) The date and hour at which the enquiry will commence shall be fixed so as to give the officers mentioned or referred to in clauses (a), (b), (c) and (d) of this rule sufficient time to reach the place where the enquiry is to be held. L

(6) Report of departmental enquiry.

- (1) As soon as any departmental enquiry has been completed, the railway servant who made the enquiry shall submit to the Agent or Manager a report in the form prescribed by Rule 25. M
- (2) The Agent or Manager shall forward a copy of such report :—(a) to the Government Inspector mentioned in rule 5, cl. (b), and (b) if no enquiry has been made under Rule 16, or if the departmental enquiry has been made, first to the Magistrate or officer mentioned in Rule 5, cl. (a), and (c) if any judicial enquiry is being made, to the Magistrate making such enquiry. N

1.—“Power to make rules....accidents”—(Continued).

RULES FOR ENQUIRING INTO, AND REPORTING ON,
SERIOUS ACCIDENTS ON INDIAN RAILWAYS—(Contd.).

(3) Such copy shall be accompanied:—in case (b), by a statement of the persons, if any, whom the Agent or Manager desires to prosecute, and in case (c), by a copy of the evidence taken at the departmental enquiry. **O**

(4) Whenever an Agent or Manager receives a copy of the Government Inspector's report as contemplated in Rule 24, he shall submit his remarks thereon through the authority in administrative control of the Railway for the information of the Government of India, and shall forward a copy of such remarks to the Government Inspector concerned. **P**

(7) Assistance in holding the enquiry.

(1) Whenever any accident has occurred in the course of working a railway, the Agent or Manager shall give all reasonable aid to the District Magistrate or the Magistrate appointed or deputed under Rule 16, and to the Government Inspector, Medical officer, the police, and others concerned, to enable them promptly to reach the scene of the accident, and shall assist those authorities in making enquiries and in obtaining evidence as to the cause of the accident. **Q**

(2) When any enquiry under Rule 16 or any judicial enquiry is being made, the Agent or Manager shall arrange for the attendance, as long as may be necessary, at the office or place of enquiry, of all railway servants whose evidence is likely to be required. **R**

8) Arrest of offender.

Whenever any accident has occurred in the course of working a railway, and any offence referred to in S. 131 of the Indian Railways Act, 1890, has been committed, the Agent or Manager or some officer of the railway nominated by him, or if there be no such officer, the railway officer of highest rank present, may direct the senior Police Officer or Policeman present, or if there be no member of the Police force present, a railway servant, at once to arrest the offender, and no railway servant shall arrest any person under the authority of the said section without such direction, except for the purpose of preventing him from making his escape. provided that, when such offender is a railway servant whose arrest is considered for any reason undesirable, proper precautions shall be taken to prevent his escape. **S**

9) Medical aid to sufferers.

Whenever any accident occurring in the course of working a railway has been attended with serious personal injury, it shall be the duty of the Agent or Manager to afford medical aid to the sufferers and to see that they are properly and carefully attended to till removed to their home or handed over to the care of their relatives or friends. In any such case, or in any case in which any loss of human life has occurred, the local Medical Officer should be communicated with, if he is nearer than any Railway Medical Officer. **T, U**

9) Duties of Police Officers.

The Railway Police may make an investigation into the causes which led to any accident occurring in the course of working a railway, and shall do so—

1.—“Power to make rules....accidents”—(Continued).

RULES FOR ENQUIRING INTO, AND REPORTING ON,
SERIOUS ACCIDENTS ON INDIAN RAILWAYS—(Contd.).

(a) Whenever any such accident is attended with loss of human life, or with grievous hurt as defined in the Indian Penal Code, or with serious injury to property, or has *prima facie* been due to any criminal act or omission; or, Y

(b) Whenever the District Magistrate or the Magistrate appointed under Rule 16 has given a direction under cl. (c) of that rule. W

Provided that no such investigation shall be made when a Magisterial enquiry has been commenced or ordered under Rule 16, cl. (a), or cl. (b).

(11) Who to conduct the Police investigation.

(1) Whenever an investigation is to be made by the railway police:—

(a) in a case in which an accident is attended with loss of human life or with serious injury to persons or property.

(b) in pursuance of a direction given under Rule 16, cl. (c), the investigation shall be conducted by the officer in charge of the Railway Police, or, if that officer be unable to conduct the investigation himself, then by an officer to be deputed by him. X

(2) An officer deputed under cl. (1) of this rule shall ordinarily be an Assistant Superintendent of Police, but if in any case it should be found impracticable to depute an officer of that grade, an Inspector of Police may be deputed. Y

(12) Mode of conducting the Police investigation.

The officer who is to conduct an investigation in pursuance of Rule 11 shall proceed without delay to the scene of the accident and conduct the investigation there, and shall at once advise the Agent or Manager of the Railway and the Traffic officer of District, by telegraph, of the date and hour at which the investigation will commence, so that, if possible, the presence of a railway official may be arranged for, to watch the proceedings and to aid the officer making the investigation. The absence of a railway official must not, however, be allowed to delay the investigation, which should be made as soon as possible after the accident has taken place. Z

(13) Railway Police to communicate with District Police.

(a) In every case to which rule 11 applies, immediate information shall be given by the Railway Police to the District Police, who, if so required, shall afford all necessary assistance, and shall, if occasion arise, carry the investigation beyond the limits of the railway premises. But the Railway Police are primarily entrusted with the duty of carrying on the investigation within such limits. A

(b) Subject to any provisions elsewhere contained in these rules, the further prosecution of the case, on the conclusion of the Police investigation, shall rest with the Railway Police. B

(14) Communication of the report of investigation.

The result of every Police investigation shall be reported at once to the Magistrate of the district, or other officer appointed in this behalf by the Local Government, and to the Agent or Manager of the Railway. C

1.—“Power to make rules.....accidents”—(Continued).

RULES FOR ENQUIRING INTO, AND REPORTING ON, SERIOUS ACCIDENTS ON INDIAN RAILWAYS—(Contd.).

(15) District Police to act in the absence of Railway Police.

Where there are no Railway Police, the duties imposed by Rules 10, 11 and 12, Rule 13, cl. (2), and Rule 14 on the Railway Police, or on the officer in charge of the Railway Police, shall be discharged by the District Police, or by the District Superintendent of Police, as the case may be.

D

(16) Duties of Magistrates.

Whenever an accident such as is described in S. 83 of the Indian Railways Act, 1890, has occurred in the course of working a railway, the District Magistrate, or any other Magistrate who may be appointed in this behalf by the Local Government, may either—

- (a) himself make an enquiry into the causes which led to the accident ; or
- (b) depute a Subordinate Magistrate, who, if possible, should be Magistrate of the first class to make such an enquiry ; or
- (c) direct an investigation into the causes which led to the accident to be made by the Police.

(17) Notice of Magisterial enquiry.

E

Whenever it is decided to make an enquiry under Rule 16, cl. (a), or cl. (b), the District Magistrate or other Magistrate appointed as aforesaid, or the Magistrate deputed under Rule 16, cl. (b), as the case may be, shall proceed to the scene of the accident and conduct the enquiry there, and shall at once advise the Agent or Manager of the railway and the Government Inspector, by telegraph, of the date and hour at which the enquiry will commence, so as to enable the Railway Administration to summon the requisite expert evidence.

F

(18) Power to summon witnesses.

A Magistrate making an enquiry under Rule 16 may summon any railway servant, and any other person whose presence he may think necessary, and after taking the evidence and completing the enquiry, shall, if he considers there are sufficient grounds for a judicial enquiry, take the requisite steps for bringing to trial any person whom he may consider to be criminally liable for the accident. Whenever technical points are involved, the Magistrate should be careful to call for, and take the opinion of, the Government Inspector or other professional persons.

G

(19) Communication of the result of the Magisterial enquiry.

The result of every enquiry made under Rule 16 should be communicated by the Magistrate to the Agent or Manager of the railway and to the Government Inspector.

H

• Summoning railway employees :

If, in the course of any judicial enquiry into an accident occurring in the course of working a railway, the Magistrate desires the assistance of the Government Inspector or of the Agent or Manager of the railway, or the attendance of any officer of the railway, to explain any matter

1.—“Power to make rules....accidents”—(Continued).

RULES FOR ENQUIRING INTO, AND REPORTING ON,
SERIOUS ACCIDENTS ON INDIAN RAILWAYS—(Contd.).

relating to railway supervision, management or working, he will issue a requisition to such officer to attend the Court, stating at the same time the nature of the assistance required. In summoning railway servants, the Magistrate will take care not to summon so large a number of the employees, specially of one class, on the same day, as to cause inconvenience to the working of the railway. In the case of very serious accidents, it will generally be advisable for the Magistrate to receive either the evidence of, or a report from, both the Government Inspector and the Agent or Manager of the Railway in regard to the accident, before finally concluding the judicial enquiry. I

(21) Report of Magisterial enquiry.

On the conclusion of any such judicial enquiry, the Magistrate shall send a copy of his decision to the Agent or Manager of the Railway, and shall, unless in any case he thinks it unnecessary to do so, report the result of the enquiry to the Local Government. J

(22) Duties of the Government Inspector appointed under S. 4 (1) of the Indian Railways Act, 1890.

Whenever the Government Inspector receives notice under S. 83 of the Indian Railways Act, 1890, of the occurrence of an accident which he considers of a sufficiently serious nature to justify such a course, he shall report the occurrence direct to the Government of India by telegraph. K

(23) Every such report shall contain the particulars prescribed by Rule 2.

(a) The Government Inspector shall proceed to the scene of the accident to note the facts and to enquire generally into the causes which led to the accident, whenever he receives notice as aforesaid of an accident which he considers serious enough to warrant an enquiry or investigation being made under any of these rules. L

If the Government Inspector, after reporting to the Government of India the occurrence of an accident according to Rule 22, decides that an enquiry or investigation is not necessary, he shall in every such case advise the Government of India accordingly. M

(b) Whenever an enquiry under cl. (a) of this rule is made by the Government Inspector, he shall, if practicable, be present at the departmental enquiry (if any) made under Rule 4. N

(24) Report of the Government Inspector.

Whenever the Government Inspector has made an enquiry under Rule 23, cl. (1) he shall submit a report in writing, through the Senior Government Inspector, to the Local Government or Administration controlling the railway, and to the Government of India, or, in the case of a railway directly administered by the State, to the Government of India only; and shall forward a copy of such report to the Agent or Manager of the railway concerned, and, if a Magisterial enquiry has been made, to the Magistrate who made such enquiry. O

1.—“Power to make rules....accidents”—(Concluded).

RULES FOR ENQUIRING INTO, AND REPORTING ON,
SERIOUS ACCIDENTS ON INDIAN RAILWAYS—(Concl'd.).

(25) Form and contents of Government Inspector's report.

In the case of all serious accidents, such reports shall be submitted in the form adopted by the Inspecting officers of the Board of Trade, in order to admit of their reproduction in a uniform shape in the quarterly accident returns; and shall contain:

- (i) a brief description of the accident;
- (ii) a description of the locality of the accident;
- (iii) a detailed statement of the evidence taken;
- (iv) the conclusion arrived at by the Government Inspector;
- (v) an appendix stating the damage done; and
- (vi) (when necessary) a sketch illustrative of the accident.

(26) Accident necessitating change in working—Procedure of Government Inspector.

In important cases, where the occurrence of an accident appears to show that a change in the system of working is necessary, the Government Inspector shall inform the Government of India, or the Local Government or Administration controlling the railway, of the steps which have been, or are proposed to be, taken by the Railway Administration to prevent a recurrence of similar accidents, and whether, in his opinion, further action in the matter is desirable.

(27) Government Inspector, duty of, to assist Magistrate.

The Government Inspector shall, as far as possible, assist any Magistrate making an enquiry under Rule 16, or a judicial enquiry, whenever he may be called upon to do so.

N.B.—These rules do not limit the exercise of any of the powers conferred on Government Inspectors by S. 5 of the Indian Railways Act, 1890.

85. Every railway administration shall send to the Governor-General in Council a return of accidents occurring upon its railway whether attended with personal injury or not in such form and manner, and at such intervals of time as the Governor-General in Council directs.

Old Acts.

Act IV of 1879 ... S. 7.

.. XVIII of 1854 ... S. 42.

86. Whenever any person injured by an accident on a railway claims compensation on account of injury, any Court or person having, by law or consent of parties, authority to determine the claim may order that the person injured be examined by some duly-qualified medical practitioner named in the order, and not being a witness on either side, and may make such order with respect to the costs of the examination as it or he thinks fit.

Provision for compulsory medical examination of person injured in railway accident.

Old Acts.

Act IV of 1879. }
 „ XVIII of 1854. } No corresponding provision.

(Notes).

(A)- General.

(1) Analogous provision.

Cf. S. 26, the Regulation of Railways Act, 1868 (31 and 32 Vict., C 119).

(2) Railways must pay surgeon for attending servant injured by 'accident, though verbally engaged. S

A surgeon retained by the General Manager of a railway to attend a servant of the company injured by an accident on the line can recover his charges, though only verbally engaged. *Walker v. Gt. West Rail. Co.*, 1867, L.R. 2 Ex. 228, overruling *Cor. v. Midl. Rail. Co.*, 1849, 18 L.J. Ex. 65, so far as relates to the necessity of a sealed contract. T

(B)—Discovery of medical report in cases of railway accident—
Privileged communication—English cases.

(1) Report not privileged.

Semble—Report made in pursuance of an order under the Section is not a privileged one. *Friend v. L. C. and D. Ry. Co.*, 46, L.J. Ex. 696. U

(2) Reports of medical men.

But—, obtained at the instance of a railway company after the making of a claim for compensation for being submitted to the solicitors of the company are privileged. *Cossey v. T. B. and S. C. Ry. Co.*, L.R. 5 C.P. 140. Y

(3) Privileged document.

A document, in order to be privileged, must have come into existence for the purpose of being communicated to the solicitor with the object of obtaining his advice. *Friend v. London Chatham and Dover Ry. Co.*, 2 Ex. D 437, cited in 11 C. at p. 657. W

(4) Privileged communication.

(a) Under the terms of S. 129, Evidence Act, only communications which have passed between a person and his legal professional advisers are privileged. 2 B. 451. (*Anderzo v. Bank of British Colombia*, 2 Ch. D. 644. *Bestros v. White*, 14 Q. B. 423, F.) X

(b) But there are some cases in which communications made for the purpose of litigation between third persons and the legal adviser, or third persons and the client, are protected from disclosure. *Wheeler v. Le Merchant*, 17 Ch. Div. 675. Y

(c) Such communications are privileged only when made in contemplation of litigation or for the purpose of obtaining or giving evidence with reference to it. (*Ibid.*) Z

(d) (i) "Any report or communication by an agent or servant to his master or principal, which is made for the purpose of assisting him to establish his claim or defence in an existing litigation, is privileged, and will not be ordered to be produced." *Per Brett, J., in Wolley v. North London Ry. Co.*, 4 C. P. 602. A

**(B)—Discovery of medical report in cases of railway accident—
Privileged communication—English cases.—(Concluded.)**

(ii) "But if the report or communication is made in the ordinary course of the duty of the agent or servant, whether before or after the commencement of the litigation, it is not privileged and must be produced."

*(*Ibid.*)

B

(iii) "The time at which the communication is made is not the material matter, nor whether it is confidential, nor whether it contains facts or opinions,"

C

(iv) "The question is, whether it is made in the ordinary course of the duty of the servant or the agent, or for the instruction of the master or principal as to whether he should maintain or resist litigation."

(*Ibid.*)

D

(b) Discovery of medical reports in cases of railway accident.

(a) In *Woolley v. North London Ry. Co.*, 4 C.P. 602, which was an action for personal injury sustained by a passenger against the Railway Company, inspection was granted of reports made by the inspectors of the defendant company and by the guard of the train to the general Manager, but was refused in the case of reports made to the Locomotive Superintendent from scientific men consulted on behalf of the defendant company with reference to the cause of the accident. "Where reports of this kind" said Byles, J. "are made in the course and as part of the duty of the officers, whether an action is pending or not, and whether it contains facts or opinions, they must be produced; but if they are made confidentially and for the purpose of litigation, and not in the ordinary course of the duty of the person making them, they are privileged." (*Baker v. Land and S. W. Ry. Co.*, L.R. 3 Q.B. 91, D.).

E

(b) When the defendants, in order to ascertain whether or not they ought to yield to a claim by the plaintiffs for damages for personal injuries alleged to have been sustained in an accident on the defendants' line of railway, sent their medical officer, before litigation commenced or was formally threatened, to report to them upon the nature of the plaintiffs' injuries, it was held that the reports of such medical officer were privileged, and that the plaintiffs were not entitled to have inspection of them. *Cossey v. L. B. and S.C. Ry. Co.*, L.R. 8 C.P. 146, (*Baker v. Land and S. W. Ry.*, L.R. 3 Q.B. 91, D.).

F

(c) In *Fenner v. L. & S. E. Ry. Co.*, L.R. 7 Q.B. 767, the documents of which inspection was sought, were letters and reports which had passed between the company's servants upon the subject of litigation after the company's manager was aware that litigation was probable. Inspection was refused on the ground that they were not written or made in the ordinary course of the duty of the person or persons writing or making them, but were made confidentially for the purpose of, or with a view to litigation and resisting the plaintiff's claim. It was however decided that these documents were relevant to the question in dispute, that they fell within the general rule as to a litigant being entitled to a discovery of all the documents in his adversary's possession relevant to his case, and that they were not privileged as falling within any of the exceptions.

G

CHAPTER IX (1).

PENALTIES AND OFFENCES.

Forfeitures by Railway Companies.

(Notes.)

1.—“Ch. IX.”

(1) Scope of the Chapter.

The various offences which are created by the Act are mentioned in this Chapter. 11 C.W.N. 583 (584)=5 Cr. L.J. 463. H

(2) Analysis of Chapter IX.

(A) Ss. 99–105.

—relate to offences by railway servants. Some of them briefly are.—

Drunkenness; endangering the safety of persons by disobeying rules or by any rash or negligent Act; compelling passengers to enter carriages already full; omission to give notice of accident; obstructing level-crossings; and submitting false returns. I

N.B.—These are offences on the part of railway servants.

(B) Ss. 106–130.

Deal with other offences. Some of them briefly are.

Giving false account of goods; unlawfully bringing dangerous or offensive goods on a railway; needlessly interfering with means of communication in a train; entering compartment reserved or already full; resisting entry into a compartment not full; smoking; defacing public notices; fraudulently travelling or attempting to travel without proper pass or ticket; travelling without pass or ticket, or with insufficient pass or ticket or beyond authorised distance; transferring return-half of return ticket, altering or defacing pass or ticket; being or suffering person to travel on railway with infectious or contagious disorder; entering carriage in motion, or otherwise improperly travelling on a railway; drunkenness or nuisance on a railway; obstructing railway servant in his duty; trespass and refusal to desist from trespass; disobedience of omnibus drivers to directions of railway servants; opening or not properly shutting gates; cattle trespass; maliciously wrecking or attempting to wreck a train; maliciously hurting or attempting to hurt persons travelling by railway; endangering safety of persons travelling by railway by wilful or rash act or omission. J

(3) Penal provisions of Act IX of 1890, nature of

The Penal provisions in the Railway Act (1890) are not obviously exhaustive, and there is nothing in the Act itself or any other enactment in force in India which excludes the operation of the general laws in force as to offences which are not punishable under the Act. 11 C.W.N. 100 =4 Cr. L. J. 439=5 C.L.J. 47. K

87. If a railway company fails to comply with any requisition made under section 13, it shall forfeit to the Government the sum of two hundred rupees for the default, and a further sum of fifty rupees for every day after the first during which the

Penalty for default in compliance with requisition under section 13.

default continues.

Old Acts.

Act IV of 1879 ... S. 52.

„ XVIII of 1854 .. No corresponding provision.

88. If a railway company moves any rolling-stock upon a railway by steam or other motive power in contravention of section 16, sub-section (2), or opens or uses any railway or work in contravention of section 18, section 19, section 20, or section 21, or re-opens any railway, or uses any rolling-stock, in contravention of section 24, it shall forfeit to the Government the sum of two hundred rupees for every day during which the motive power, railway, work, or rolling-stock is used in contravention of any of those sections.

Penalty for contravention of section 16, 18, 19, 20, 21, or 24.

Old Acts.

Act IV of 1879 ... S. 21.

„ XVIII of 1854 ... No corresponding provision.

89. If a railway company fails to comply with the provisions of section 47, sub-section (6), section 54, sub-section (2), or section 65, with respect to the books or other documents to be kept open to inspection, or conspicuously posted at stations on its railway, it shall forfeit to the Government the sum of fifty rupees for every day during which the default continues.

Penalty for not having certain documents kept or exhibited at stations under section 47, 54 or 65.

Old Act.

This section is new.

90. If a railway company fails to comply with the provisions of section 47 with respect to the making of general rules, it shall forfeit to the Government the sum of fifty rupees for every day during which the default continues.

Penalty for not making rules as required by section 47.

Old Acts.

Act IV of 1879 ... S. 23.

„ XVIII of 1854 ... No corresponding provision.

91. If a railway company refuses or neglects to comply with any decision of the Governor-General in Council under section 48, it shall forfeit to the Government the sum of two hundred rupees for every day during which the refusal or neglect continues.

Penalty for failure to comply with decision under section 48.

Old Acts.

Act IV of 1879. }
 „ XVIII of 1854. } No corresponding provision.

(Note).

Analogous provision.

Cf. S. 11 of Railway Regulation Act, 1842 (5 and 6 Vic., C. 55).

L

92. If a railway company fails to comply with the provisions of section 52 or section 85 with respect to the submission of any return, it shall forfeit to the Government the sum of fifty rupees for every day during which the default continues after the fourteenth day from the date prescribed for the submission of the return.

Penalty for delay in submitting returns under section 52 or 85.

Old Acts.

Act IV of 1879 .. S 23.
 „ XVIII of 1854 .. S 42.

(Note).

Analogous provision.

Cf. S. 3 of the Railway Regulation Act, 1840 (3 and 4 Vic., C. 97).

M

93. If a railway company contravenes the provisions of section 53 or section 63, with respect to the maximum load to be carried in any waggon or truck, or the maximum number of passengers to be carried in any compartment, or the exhibition of such load on the waggon or truck, or of such number in or on the compartment, or knowingly suffers any person owning a waggon or truck passing over its railway to contravene the provisions of the former of those sections, it shall forfeit to the Government the sum of twenty rupees for every day during which either section is contravened.

Penalty for neglect of provisions of section 53 or 63 with respect to carrying capacity of rolling-stock.

Old Act.

This section is new.

94. If a railway company fails to comply with any requisition of the Governor-General in Council under section 62 for the provision and maintenance in proper order, in any train worked by it which carries passengers, of such efficient means of communication as the Governor-General in Council has approved, it shall forfeit to the Government the sum of twenty rupees for each train run in disregard of the requisition.

Penalty for failure to comply with requisition under section 62 for maintenance of means of communication between passengers and railway servants.

Old Acts.

Act IV of 1879
" XVIII of 1854 } No corresponding provision.

(Notes).

(1) Analogous provision.

Of S. 22, the Regulation of Railways Act, 1868 (31 and 32 Vic., C. 119).

(2) Precaution required by statute.

(a) The omission by the company to take any precautions which it is directed by statute to take, would, it seems, in all cases be evidence of negligence as against a person who can be shown to belong to the class for whose benefit the precautions were intended, and who is injured by the neglect of the company to take the precaution. See *Blanures v. Lancashire and Yorkshire Ry. Co.*, L.R. 8 Ex. 283. **O**

(b) Thus, if the company is required to provide means of communication in passenger trains between the passengers and the servants of the company, the failure to provide such communications would be evidence of negligence in an action by a passenger injured thereby. (*Ibid.*) **P**

(3) Train.

A— is or is not within S. 22 of the Regulation of Railways Act, 1868, according to the instructions as to stopping given to the company's servants. *Blanures v. Lancashire and Yorkshire Ry. Co.*, 42 L.T. Ex. 182. **Q**

95. If a railway company fails to comply with the requirement

Penalty for failure to reserve compartments for females under section 64.

of section 64 with respect to the reservation of compartments¹ for females or the provision of closets therein, it shall forfeit to the Government

the sum of twenty rupees for every train in

respect of which the default occurs.

Old Act.

This section is new.

(Notes).

1.—“Compartments.”

Compartment, meaning of.

See. 24 B. 293 noted under S. 64, *supra*. **R**

Penalty for omitting to give the notices of accidents required by section 83 and under section 84.

96. If a railway company omits to give such notice of an accident as is required by section 83 and the rules for the time being in force under section 84, it shall forfeit to the Government the sum of one hundred rupees for every day during which the omission continues.

Old Acts.

Act IV of 1879 " S. 28.

" XVIII of 1854 " S. 41.

97. (1) When a railway company has, through any act or omission, forfeited any sum to the Government under the foregoing provisions of this chapter, the sum shall be recoverable by suit in the District Court having jurisdiction in the place where the act or omission or any part thereof occurred.

(2) The suit must be instituted with the previous sanction of the Governor-General in Council, and the plaintiff therein shall be the Secretary of State for India in Council.

(3) The Governor-General in Council may remit the whole or any part of any sum forfeited by a railway company to the Government under the foregoing provisions of this chapter.

Old Act.

This section is new.

(Note).

Scope of section.

This section provides that the penalties incurred by railway administrations must be recovered in a District Court at the suit of the Secretary of State for India in Council, and authorises the Governor-General in Council to remit such penalties. (See Statement of Objects and Reasons).

Alternative or supplementary character of remedies afforded by the foregoing provisions of this chapter.

98. Nothing in those provisions shall be construed to preclude the Government from resorting to any other mode of proceeding instead of, or in addition to, such a suit as is mentioned in the last foregoing section, for the purpose of compelling a railway company to discharge any obligation imposed upon it by this Act.

Old Act.

This section is new.

Offences by Railway Servants.

99. If a railway servant whose duty it is to comply with the provisions of section 60 negligently or wilfully omits to comply therewith, he shall be punished with fine which may extend to twenty rupees.

Breach of duty imposed by section 60.

Old Acts.

Act IV of 1879 ... S. 23.

„ XVIII of 1854 .. No corresponding provision.

M.B.—See Notes under S. 60, *supra*.

(Note).

1.—“Breach of duty.”

Liability for tortious act of servants.

A Railway Company will have to be liable for the manner in which their servants do any act which is within the scope of their authority, and is answerable for any tortious act of their servants, provided such act is not done from any caprice of the servant, but in the course of his employment. 13 M. 34 (38). T

100 If a railway servant is in a state of intoxication while on duty, he shall be punished with fine which may extend to fifty rupees, or, where the improper performance of the duty would be likely to endanger the safety of any person travelling or being upon a railway, with imprisonment for a term which may extend to one year, or with fine, or with both ¹.

Old Acts.

Act IV of 1879.. .. S. 25
 „ XVIII of 1854.. .. S. 27.

(Notes).

(General).

(1) Analogous provision.

Cf. S. 17, the Railway Regulation Act, 1842 (5 and 6 Vic., C. 55) U

N.B.—See Notes under S. 60, *supra*

(2) Charged and tried under first part of section—Convicted under latter part of section—Procedure in warrant cases, not followed.

A Magistrate proceeded in the first instance as if the case fell under the first part of S. 100 of the Act, and adopted the procedure for summons cases. Eventually, the accused was convicted of an offence under the latter part of the section, which contemplates a warrant case. *Held*, that the action of the Magistrate was illegal. 5 M.L.T. 204. Y

1.—“If a railway ... both.”

(1) Drunkenness.

(a) The—of a guard or underguard in charge of a railway train or any part thereof is an offence. 1 M.H.C.R. 193. W

(b) But the High Court has no jurisdiction to try a prisoner charged with such offence, where he was removed from his post at a place outside the local limits, although the train thereupon proceeded with him to Madras. (*Ibid.*) X

(2) Railway police force—S. 9, District Police (Bom.) Act VII of 1867—Neglect of duty.

Members of the Police force who are styled the Railway police, and are in the pay of a Railway Company, are amenable for neglect of duty to the provisions of S. 27, Act XVIII of 1854 (*Cf.* Ss. 100, 101, present Act), notwithstanding that they hold commission from the Commissioner of Police under S. 9, Bom. Act VII of 1867. Rat. Unrep. Cr. Cas. 51. Y

Endangering the
safety of persons¹.

101. If a railway servant, when on duty, endangers the safety of any person—

- (a) by disobeying any general rule made, sanctioned, published, and notified under this Act, or
- (b) by disobeying any rule or order which is not inconsistent with any such general rule, and which such servant was bound by the terms of his employment to obey, and of which he had notice, or
- (c) by any rash or negligent act or omission,

he shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to five hundred rupees, or with both.

Old Acts

Act IV of 1879 .. S. 26.
,, XVIII of 1851 ... Ss. 27 and 29.

(Notes).

General.

(1) Analogous provision.

Cf. S. 13, the Railway Regulation Act, 1840 (3 and 4 Vic., C. 97), and S. 17, the Railway Regulation Act, 1842 (5 and 6 Vic., C. 55). Z

(2) Duty of Railway Company.

- (a) The benefit which a carrying company derived, directly or indirectly, from the carriage of passengers, imposed upon the company the corresponding obligation of taking due and reasonable care for their safety. *Foulker v. Metropolitan District Railway Co.*, (1880) L.R. 5 C.P.D. 157. A
- (b) A violation of the duty thus imposed on a carrying company, an omission on their part to take such due and reasonable care to insure the safety of their passengers whom they invite to travel by their carriers, is considered as negligence. (*Ibid*). B

(3) Intention of Legislature.

It appears to have been the—to make only those acts or omissions offences which themselves led to or might lead to certain results, and to leave a subsidiary acts or omissions to be dealt with departmentally. [In the Chief Court of Punjab, 6th Nov. 1894. Cr. Revision case No. 1049 of 1894.] C

(4) Liability under section when arises.

- (a) Persons are liable to conviction under S. 26, Act IV of 1879 (*cf.* present section), not by reason of consequences directly referable to default in observing the rules, but by reason of damages or risk which it entails. D

4 M. 201 = 1 Weir 867.

General—(Continued).

- (b) Where it was required by a rule, sanctioned and notified as required by law, that the guard and driver of ballast-train should, on a line worked on the block-system, stop the train at a station and should not leave the station till the guard has received from the station master and delivered to the driver a "line-clear certificate," disobedience of such rule by the guard and driver which endangered the safety of person, was held to make them liable to be punished under the section. (*Ibid*). E
- (c) It is no answer to the charge, that the rule had been habitually broken, if the evidence as to the disregard of it is reliable, nor is it any answer to the charge that obedience to the rule would possibly not have prevented the accident which occurred. (*Ibid*) F

(5) Gist of offence.

- (a) The prisoner, a railway servant, was convicted under S. 29, Act XXV of 1871 (*cf.* present section) of endangering the lives of the persons in a certain train by negligence. Although he was shown to have neglected his duty, there was no evidence whatever of the safety of any person in any train having been endangered by his neglect of duty: held, that he could not be convicted under S. 29, Act XXV of 1871, as it was plainly apparent that, by reason of the precautions taken by other persons, any possible danger which might have resulted from his neglect was averted. 5 N.W.P. 240. [13 P.R. 1905 (Cr.) = 591 L.R. 1907 = 5 Cr. L.J. 81, D.] G
- (b) The case reported in 5 N.W.P. 240 is not an authority for the proposition that, if a collision or injury is averted, there cannot be a conviction under S. 101 of Act IX of 1890. 11 C.W.N. 173 = 5 Cr. L.J. 16. H

(6) To constitute an offence.

—under this section, the act or disobedience must itself endanger safety. In the Punjab Chief Court, 6th Nov. 1894. (Cr. Revision case No. 1049 of 1894). I

(7) Essence of the offence.

The—under this section is the danger or risk entailed by the neglect of the rules, irrespective of the consequences which actually will ensue. 4 L.B.R. 139 = 7 Cr.L.J. 417. J

(8) Necessity for sanction.

No sanction is necessary to the institution of a complaint of an offence punishable under S. 101. (*Ibid*). K

(9) Danger—Meaning of.

- (a) Danger, which means the risk of loss or injury, is a relative term. 13 P.R. 1906 (Cr). L
- (b) It may be immediate or remote; but it is none the less danger, because it is remote and there is, therefore, a better chance of avoiding it. (*Ibid*). M
- (c) Although the danger had been averted by the two trains being brought to stand still at a distance of some 300 yards from one another, that is practically equivalent to an admission, that, up to the time of stopping the trains, there had been danger. (*Ibid*). N

General—(Concluded).

(10) Cases of Criminal negligence.

All—are cases of degree, *Empress v. Bhattacharya*. Decision of N.W.P. High Court (dated 2nd May, 1892). O

(11) Negligence—Punishment.

Where a railway servant had by his negligence been the cause of an accident in which several lives were lost, *held*, that a sentence of three months' simple imprisonment was inadequate and that it ought to be enhanced. 10 A.W.N. 171. P

(12) Lights in the station.

It is not enough that the—should be sufficient for the railway company and their own servants who know the premises; they must be enough to guide and direct strangers who are unacquainted with the station. *Martin v. Great Northern Ry. Co.* Q

I.—“Endangering the safety of persons.”

(1) Breach of rule—Neglect of duty by driver.

See Cr. Appeal No. 525 of 1894, Jan. 14, 1895 (in the Chief Court of the Punjab). R

(2) Disobedience of general rules—Collision.

Disobedience of general rules, (244, 245 and 265) is punishable under S. 101 of the Act. [Suit case 973 of 1890, in the Chief Court of the Punjab.] S

(3) Disobedience of rules and neglect of duty by driver and gate-keeper.

(a) For a railway driver to pass a danger signal and go on when the line is not clear, must necessarily endanger the lives of all persons crossing the line as well as those of persons in the train. 1 Weir 868. T

(b) For a gate-keeper to go to sleep and omit to open the gates is productive of similar danger. (*Ibid.*) U

(c) When a driver ran his train at a full speed with danger signals against him through a closed gate, *held*, that his act endangered the safety of himself and other persons in the train which he was driving, and that the act therefore amounted to an offence under S. 101. 1 Weir 869. Y

(4) Neglect of duty by Engine driver.

(a) An Engine driver, when he sees that signals are at danger, must know or at all events have reason to believe that they have been put at danger because there is danger, and that, if the train runs through them, there will be an accident. [Cr. Appeal No. 297 of 1896, August 13 and 15, 1896, in the Chief Court of the Punjab.] W

(b) And he cannot escape on the plea that danger ought not to have been caused by the improper shunting of engines. (*Ibid.*) X

(c) It was enough for him that he was ordered by signal to stop, and he was bound to obey orders unquestionably. (*Ibid.*) Y

1.—“*Endangering the safety of persons*”—(Continued).

(5) **Endangering safety of any person—Starting train without having been given line-clear.**

A driver of a train is guilty of an offence under this section, when he starts a train without having been given a line-clear, though, owing to distance of the train coming from the opposite side, danger to persons in the trains is remote. 59 P.L.R. 1907=13 P.R. 1106=5 Cr.L.J. 81. **Z**

(6) **Safety of persons endangered—Gateman asleep—Omission of engine-driver to stop train.**

The Magistrate found that the accused, a gateman, was asleep on duty and did not open his gates when a train was coming, that the accused was therefore negligent on duty and the safety of human beings was thereby put in danger, and the Magistrate held, that the accused was not free from responsibility because the engine-driver also neglected to stop the train before reaching the gates. Held, that the conviction was right. 9 P.R. 1892 (Cr.). **A**

(7) **Engine driver starting train without line-clear ticket—No immediate danger.**

(a) A fireman in charge of a train breaks the rules of his service and does a rash and negligent act in starting the train at all, and in driving down the line without having been given “line-clear.” 13 P.R. 1906 (Cr.). **B**

(b) Although, owing to the distance of the other goods train running in the opposite direction, and owing to the precautions taken by the drivers of both the trains, the danger was remote, yet a state of danger was created when the accused took his train on to, and proceeded to drive it down, the line. (*Ibid*) **C**

(c) By so doing, he “endangered” the ‘safety’ of the persons on the two trains within the meaning of S. 101. (*Ibid*). **D**

(8) **Guard—Driver—Starting an engine without whistling—Overrunning a boy on the line.**

A railway guard failed to give to the engine driver a signal to sound his whistle before starting the engine which he was bound to do under S. 244 of the Railway rules. The engine having been put on motion, caused a boy, who was painting a wagon on the line, injury which resulted in his death. The Magistrate convicted him, under S. 101, of endangering the safety of persons by a rash and negligent act, and sentenced him to undergo simple imprisonment to one day and pay a fine of Rs. 20: held, ordering a new trial, that, as the trying Magistrate found that as the injury to the deceased boy was caused by the negligence of the accused and that the boy died thereupon, S. 304-A., I.P.C., appeared more applicable, especially as the trial under it must take place, before a higher tribunal. Rat. Unrep. Cr. C. 721. **E**

9) **Neglect of duty by the points—Jamadar.**

A Jamadar whose duty it is to close the points, endangers the safety of the travelling public by not properly closing and locking the points. In the Chief Court of the Punjab, 7th Jan. 1896. (Cr. Revision No. 1956 of 1894). **F**

1.—“*Endangering the safety of persons*”—(Continued). •

(10) Neglect of duty by station-master and line Jamadar—Oudh and Rohilkhand Railway.

It is the duty of the station-master to see that facing points are securely locked before allowing a train to come on into the station. Breach of the rule results in conviction. *Empress v. O. C. Bhattacharji*, (Decision of N. W. P. High Court, dated 2nd May 1892) **G**

(11) Negligence of station-master—Collision—Endangering safety.

Where, in consequence of the omission of a station-master to take down the line-clear signal, a mixed train was run into the station and a collision took place, in which one wagon was derailed, but as the train was moving slowly no person was injured, *held*, that the omission on the part of the station-master constituted an offence under S. 101 of the Act. 11 C.W.N. 173=5 Cr. L. J. 16. **H**

(12) Disobedience of railway rules and endangering safety of any person—Station-master, duty and responsibility of.

(a) Rule 247 of the railway rules, throws on a station-master the responsibility for ensuring that all points are correctly set and all facing points securely locked for the passage of trains. 4 L.B.R. 350=9 Cr. L.J. 352. **I**

(b) So, where a station-master omitted to inspect the points and satisfy himself that they were correctly set, before he ordered the signal to be lowered, and allowed the mail to enter the station, and the mail in consequence came in on a side line, and collided with the goods train there, *held*, he disobeyed the rule which he was bound to obey and thereby endangered the safety of many persons, and that he therefore committed an offence under cl. (b) of S. 101 of the Act, (*Ibid.*) (4 L.B.R. 139, F; 32 C. 73, D). **J**

(c) An Assistant station-master, after he gave a line-clear ticket to the guard of a down train waiting at his station, received information from the next station to cancel the line-clear so given, in order to allow an up-train proceeding from that station. He at once gave line-clear for the up-train to come, but without first taking back the line-clear he had already issued to the guard of the down train. So, before he went out to look for the guard, the down train had started and afterwards met the up-train between the two stations, though the driver was able to stop the train in time and avoided a collision. *Held*, the act of giving a line-clear for the up-train without first getting back the line-clear he had given to the guard of the down-train, was a flagrant disobedience of the railway rules, and that he committed an offence under S. 101 of the Act by endangering the safety of many persons by disobeying a rule which he was bound to obey. 4 L.B.R. 353 (32 C. 73, D). **K**

(13) Danger caused by disobedience to railway rules—Responsibility of station-master.

A, an Assistant station-master, allowed the signal to be given for a train to run through his station without satisfying himself as required by the rules made under this Act, that all the prescribed precautions had been taken by the Jamadar subordinate to him. The train was switched off the main line on to a line on which some waggons were standing

c 1.—“*Endangering the safety of persons*”—(Concluded).

and collided with them. This could not have occurred if the rules had been complied with. A was tried, under S. 101 of the Act. He was convicted and fined Rs. 30, the Magistrate remarking that he considered his offence merely technical, and that the collision was practically the result of the acts and omission of the Jamadar. *Held*, that the Magistrate's view of the relative responsibility of A and the Jamadar was, in view of their relative positions, radically wrong, and that A was the more guilty of the two. A substantive sentence of imprisonment was passed on A. 4 L.B.R. 139=7 Cr.L.J. 117. a L

(14) **Causing death by rash and negligent act—Endangering safety of passengers.**

In the Bengal Nagpore line, which is worked on the line-clear and caution-message system, no train is allowed to start from a station without a line-clear certificate to the effect that the line is clear up to the next station. The station-master of a certain station had, before the arrival of a train at his station and before the receipt of a line-clear message from the next station, written out a conditional line-clear message and had left it unsigned and without filling in all the particulars required by the rules to be filled therein. On the arrival of a train at the station, the guard in charge of the train went into the station-master's room, took off the unfinished and unsigned line-clear message from the book and handed it over to the driver and started the train. All this took place without the knowledge of the station-master who had been otherwise engaged. The train came in collision with another which was coming from the opposite direction with the result that some people in the train were killed. The station-master was, on these facts, charged with, and convicted of offences under S. 304-A of the Penal Code and S. 101 of the Indian Railways Act IX of 1890. The conviction was sought to be supported on the ground that the Act of writing out the conditional line-clear message was against rule No. 18 of the Company. *Held*, the conviction was illegal, because (1) the act of the station-master did not directly lead to the serious results which followed, and (2) he could never have intended, nor did he intend, to use the conditional line-clear message in the state in which it was, nor could he have imagined that the guard would remove it from the book in his absence contrary to rules, or use it without looking over it or start the train without his permission. 32 C. 73=8 C.W.N. 645. M

(15) **Laxness of supervision.**

A—on the part of superior authorities, such for instance as permitting rule 28 to be habitually disregarded in practice, might be held to be an offence under this section. In the Chief Court of the Punjab, 6th Nov. 1891 (Cr. Revision Case, No. 1049 of 1891). M

16) **Rajaputana-Malwa Railway—Neglect of duty—Conviction of gate-keeper.**

A railway servant and a gate keeper as such, who when on duty endangers the safety of any person by any negligent omission, commits an offence punishable under this section. [In the Punjab Chief Court, 7th Sep. 1892, (Suit No. 1801 of 1892).]

102. If a railway servant compels, or attempts to compel, or causes, any passenger to enter a compartment which already contains the maximum number of passengers exhibited therein or thereon under section 63, he shall be punished with fine which may extend to twenty rupees.

Compelling passengers to enter carriages already full.

Old Acts.

Act IV of 1879 .. S. 28.

Act XVIII of 1854 .. No corresponding provision.

(Notes).

General.

Accommodation for passengers—Duty of Railway Company.

The Railway Company are bound to use reasonable care in providing accommodation for passengers, and the passengers also are bound to use reasonable care in availing themselves of the accommodation provided for them. *Praeger v. Bristol and Exeter Railway Co.*, (1871) 24 L.T. 107, cited in 7 Bom. L.R. at 127. **P**

103. If a station-master or a railway servant in charge of a section of a railway omits to give such notice of an accident as is required by section 83 and the rules for the time being in force under section 84, he shall be punished with fine which may extend to fifty rupees.

Omission to give notice of accident.

Old Acts.

Act IV of 1879 .. S. 24.

Act XVIII of 1854 .. No corresponding provision.

Obstructing level-crossings.

104. If a railway servant unnecessarily—

(a) allows any rolling-stock to stand across a place where the railway crosses a public road on the level, or

(b) keeps a level-crossing closed against the public,

he shall be punished with fine which may extend to twenty rupees.

Old Act.

Act IV of 1879

„ XVIII of 1854. } ... No corresponding provision.

(Notes).

General.

(1) Analogous provision.

Cf.—S. 5, the Railway Clauses Act, 1863 (26 and 27 vic, c 92).

(2) Object of the section.

The—is to abate the nuisance caused by rolling-stock being kept standing on level-crossings. (See Statement of Objects and Reasons.) **R**

105. If any return which is required by this Act is false in any particular to the knowledge of any person who signs it, that person shall be punished with fine which may extend to five hundred rupees, or with imprisonment which may extend to one year, or with both.

Old Act.

Act IV of 1879
Act XVIII of 1854. } .. No corresponding provision

(Note).

Analogous provision.

Cf.—S. 10, the Regulation of Railways Act, 1871 (34 and 35 Vic. c. 78).

Other offences.

106. If a person requested under section 58 to give an account with respect to any goods gives an account, which is materially false, he, and, if he is not the owner of the goods, the owner also, shall be punished with fine which may extend to ten rupees for every maund or part of a maund of the goods, and the fine shall be in addition to any rate or other charge to which the goods may be liable.

Old Acts.

Act IV of 1879 .. S. 29.

Act XVIII of 1854 .. S. 14.

(Notes).

N.B.—See notes under S. 58, *supra*.

General.

(1) Analogous provision.

Cf.—the Railway Clauses Act, 1845 (8 and 9 Vic., c. 20), Ss. 99 and 152, respectively. T

(2) Scope of section.

S. 20, Act IV of 1879 (*Cf.* S. 106, Act IX of 1890) provides only for offences committed by a person required under S. 15, Act IV of 1879 (*Cf.* S. 58 (1) present Act) to give an account of the quantity or description of property sought to be despatched by rail. 96 P.R. 1895 (Cr.). U

1.—“Giving false account of goods.”

(1) **False description of goods—Loss in freight to railway administration.**

See 7 P. R. 1890, (Cr), noted under S. 134, *infra*.

(2) **False declaration of goods—Fireworks declared as locks—Explosion of fireworks causing death of coolies.**

The accused sent two boxes to the East Indian Railway at Delhi station containing fireworks declaring them to contain iron locks, with the result that, in loading, one of the boxes exploded, killing one coolie and seriously injuring another, and for this he was convicted under Ss. 304-A and 388, I.P.C.

1.—“Giving false account of goods” —(Concluded.)

Held, that the conviction was right, though, if no injury had been done to any person, the accused could have been guilty only of an offence under S. 107 of the Act for making a false declaration. 24 P.L.R. 1905. X

107. If, in contravention of section 59, a person takes with him any dangerous or offensive goods upon a railway, or tenders or delivers any such goods for carriage upon a railway, he shall be punished with fine which may extend to five hundred rupees, and shall also be responsible for any loss, injury, or damage, which may be caused by reason of such goods having been so brought upon the railway.

Unlawfully bringing dangerous or offensive goods upon a railway 1.

Old Acts.

Act IV of 1879
Act XVIII of 1854

S. 30.
No corresponding provision.

(Notes).

General.

(1) Analogous provision.

Cf.—The Railway Clauses Act, 1845 (8 and 9 Vic. c. 20) Ss. 99 and 152 respectively. Y

(2) Ss. 107 and 134—Jurisdiction of Criminal Court—Place of trial.

See 7 P.R. 1890 (Cr.), noted under S. 134, *infra*. Z

1.—“Unlawfully....railway.”

N.B.—See notes under S. 59, *supra*.

(1) Goods of dangerous nature—Duty of persons sending—Notice.

- (a) A person, who sends, for conveyance by rail, an article which he knows to be of a dangerous and explosive nature, is bound, both on the general principles of law and by the special provisions of the Railway Act, to give notice of its contents to the Company's servants. *Farrant v. Farnes*, 3 L.J.C.P. 137 (*F*); cited in 1 A. 60 (*F.B.*) A
- (b) He is also bound to take all reasonable precautions to preclude the risk of accident. (*Ibid.*) B
- (c) Failure to do either of these things will render him liable for the consequences, whether they occur in a manner he could have contemplated or not. (*Ibid.*) C

(2) Passenger's luggage, duty to search.

It is not the duty of a Railway Company to search every parcel which every passenger carries with him. 28 C. 401 (P.C.) = 28 I.A. 144 = 5 C.W.N. 449. D

(3) Dangerous goods, of carriage of, duty to prevent.

- (a) It is the duty of the Railway Company to prevent dangerous looking goods being carried. (*Ibid.*) E

1.—“Unlawfully....railway”—(Concluded).

- (b) Where the explosion was caused by certain fire works taken in some parcels into the carriage by some fellow-passengers, and there was no evidence to show that the parcels exhibited such signs of their real nature as ought to have called the attention of the railway servants to them, there was no obligation on the Railway Company to prevent such goods from being carried. (*Ibid.*) F

(4) Consignment of fireworks declaring as locks.

- (a) Two boxes containing fireworks but declared to contain iron locks, were sent by the accused to the E. I. Ry. Co. at the Delhi Station. In loading, one of the boxes exploded killing one coolie and seriously injuring another, the accused was convicted of offences under S. 304-A and 338, I. P. C. *Held*, that the conviction was right. 22 P. R. 1905 = 2 Cr. L. J. 207 (7 M. H. C. 119) *Appl.* 6 A. 248; *Regina v. Crome*, 3 C. and K. 128; *Queen v. Williamson*, 1 Cox C. C. 97, R. G

- b) Even if nothing else had happened, the accused could have been convicted under this section for making a false declaration in respect of the two boxes consigned. (*Ibid.*) H

(5) Essential for conviction.

In order to convict a person under this section, it is necessary to prove a guilty knowledge of the character of the goods. *Hearne v. Garton*, 2 F. and E. 66. I

108. If a passenger, without reasonable and sufficient cause, makes use of, or interferes with, any means provided by a railway administration for communication between passengers and the railway servants in charge of a train, he shall be punished with fine which may extend to fifty rupees.

Old Acts.

Act IV of 1879 . . . S. 40.

Act XVIII of 1854 ... No corresponding provision.

(Note).

Analogous provision.

Cf.—S. 22 The Regulation of Railways Act, 1868 (31 and 32 Vic., c. 110). J

109. (1) If a passenger, having entered a compartment which is reserved by a railway administration for the use of another passenger, or which already contains the maximum number of passengers exhibited therein or thereon under-section 63, refuses to leave it when required to do so by any railway servant, he shall be punished with fine which may extend to twenty rupees.

Entering compartment reserved or already full, or resisting entry into a compartment not full.

(2) If a passenger resists the lawful entry of another passenger into a compartment not reserved by the railway administration for the use of the passenger resisting, or not already containing the maximum number of passengers exhibited therein or thereon under section 63, he shall be punished with fine which may extend to twenty rupees.

Old Acts.

Act IV of 1879 .. S. 39 with sub sec. (1) of the present Act.

Act XVIII of 1854 .. No corresponding provision.

Sub-S. (2) is new.

(Notes).

Analogous provision.

Cf.—The English bye-law, No. 13.

J1

110. (1) If a person, without the consent of his fellow-passengers, if any, in the same compartment ¹ smokes in any compartment except a compartment specially provided for the purpose, he shall be punished with fine which may extend to twenty rupees.

(2) If any person persists in so smoking after being warned by any railway servant to desist, he may, in addition to incurring the liability mentioned in sub-section (1), be removed by any railway servant from the carriage in which he is travelling.

Old Acts.

Act IV of 1879 ... S. 35.

Act XVIII of 1854 ... S. 6.

(Notes).

General.

Purpose of the section.

The—is to secure that no one shall smoke in a railway carriage so as to be an annoyance to any fellow passenger. *Per Jenkins, C.J.*, in 24 B. 293 = 1 Bom. L.R. 688.

K

1.—“Compartment.”

(1) “Compartment,” meaning of.

Compartment is a division separated by partitions: a part partitioned off. Oxford New Dictionary.

L

(2) Compartment.

(a) The Act contains no definition of the word—. *Per Jenkins, C. J.*, in 24 B. 293 = 1 Bom. L. R. 688.

M

(b) A clue to its meaning is to be found in S. 63 of the Act coupled with the practice of the Companies. (*Ibid.*)

N

1.—“Compartment”—(Concluded).

- (c) The practice alluded to, is that of exhibiting inside or outside of each section, though divided from its neighbour only by a partial partition, the maximum number of passengers which may be carried in it. (*Ibid.*)
- (d) Good sense requires that to the term—, in certain sections of the Act, the quality of complete separation should be attributed. It is with that force that it is used in S. 110. *Per Jenkins, C. J. and Candy J., in (Ibid.)*
- (e) But *Ranade, J.*, holds that the term—, is used in S. 110 in the same sense in which it is used throughout, and that it does not necessarily mean a completely partitioned division. (*Ibid.*)

111. If a person, without authority in this behalf, pulls down, Defacing public or wilfully injures, any board or document set up notices. or posted by order of a railway administration on a railway or any rolling-stock, or obliterates or alters any of the letters or figures upon any such board or document, he shall be punished with fine which may extend to fifty rupees.

Old Acts.

Act IV of 1879. ..	} No corresponding provision.
Act XVIII of 1854. ..	

(Note).

Analogous provision.

Cf. S. 146 The Companies Clauses Act, 1845 (8 Vic. c. 16).

Fraudulently travelling or attempting to travel without proper pass or ticket.

112. If a person, with intent to defraud a railway administration,—

- (a) enters, in contravention, of section 68, any carriage on a railway ¹ or
- (b) uses or attempts to use a single pass or single ticket which has already been used on a previous journey, or, in the case of a return ticket ², a half thereof which has already been so used,

he shall be punished with fine which may extend to one hundred rupees in addition to the amount of single fare for any distance which he may have travelled.

Old Acts.

Act IV of 1879 ..	} No corresponding provision.
Act XVIII of 1854 ..	

(Notes).

General.

(1) Analogous provision.

Cf. the English Bye-law, No. 2.

General—(Concluded).

(2) Ss. 112 and 68.

This section must be read with S. 68, *supra*. 11 C.W.N. 100=4 Cr. L.J. 439
=5 C.L.J. 47. S 1

(3) Offence under section—Essential.

(a) Fraudulent intention is doubtless by S. 3 of Act XVIII of 1854 (*Cf.* present section) made an essential condition of travelling on a railway, without payment of the fare being dealt with as an offence. 1 Bom. 52 (57). T

(b) But the absence of such intention does not make the entry into the carriage less unlawful, or of itself afford any ground for depriving the Company of the right of putting an end to such unlawful occupation. (*Ibid.*) U

(c) Entering into a railway compartment and travelling without a ticket are only some of the ingredients of an offence under S. 112. 11 C. W. N. 100=4 Cr.L.J. 439=5 C.L.J. 47 (*Bruthan v. Hoyle*, L.R. 3 Q.B.D. 289; 20 A. 95 R.). Y

(d) These acts in themselves are not penal under the section. (*Ibid.*) W

(e) The essence of an offence under the section is dishonest or fraudulent intention to defraud the railway administration of its just dues, *i.e.*, the fare payable by the passenger. (*Ibid.*) X

(f) The fraudulent intention of a passenger must appear from some other acts omission than merely travelling without a ticket, *e.g.*, an attempt to free himself from liability by producing an used an irrelevant ticket. (*Ibid.*) Y

(4) Section. how to be construed.

In *Bentham v. Hoyle* (1878) L.R. 3 Q.B.D. 289, *Cockburn, C. J.* and *Mansty J. held*, in construing a bye-law similar in terms to this section, that *mens rea*, the intention to defraud, must be proved for obtaining a conviction. 11 C.W.N. 100=4 Cr.L.J. 439=5 C.L.J. 47 (48). Z

(5) Element of the offence under S. 417, I.P.C.

The—is precisely the same as that of one under this section, and a person cannot be sentenced under both the sections separately for the same offence. (*Ibid.*) A

1.—“If a person . . . on a railway.”

(1) Conviction under S. 112 (a) when sustainable.

(a) To justify a conviction under S. 112 (a) of the Act, the prosecution must prove entry into a carriage in contravention of S. 68, that is, without a ticket and fraudulent intent in so doing. 1 Weir 870. B

(b) The mere fact that a man having a ticket travels beyond the station named on it, does not necessarily warrant the inference that he entered the carriage with a fraudulent intent. (*Ibid.*) C

(2) Fraudulently entering railway carriage without ticket.

Unless there is evidence that the accused entered a railway carriage without a ticket to defraud the railway administration, he cannot be convicted of the offence under this section for mere entry. 124 P.L.R. 1905. D

(3) Travelling with a false and an entirely irrelevant ticket.

—comes under cl. (a) of the section, but not under cl. (b). 11 C.W.N. 100=4 Cr.L.J. 439=5 C.L.J. 47. E

I.—“If a person . . . on a railway”—(Concluded).

(4) Travelling without a ticket.

—comes within the words of S. 68 and so under S. 112 (a). (*Ibid.*) F

(5) Father travelling with son aged six years without paying latter's fare.

Where the accused travelled in Company with his son aged six years from one station to another station on a railway line without paying the half-fare due to his son, *held*, that, though the accused was not guilty as the principal offender, he was clearly liable as an abettor, to be punished under S. 32, Act IV of 1879. (S. 112, Act IX of 1890). 1 Weir 869 (F.B.). " G

(6) Fraudulent intention, how proved.

The fraudulent intention of a person travelling without a ticket is proved by his not at once telling the ticket collector that he had no ticket and producing an old one. [Cr.C. No. 221 of 1896, 31st March 1896, in the Chief Court of the Punjab]. H

(7) Railway ticket not used on day of issue.

See 1 Weir 870, under S. 47, *supra*. I

(8) Entering into the train and travelling without a ticket.

a) —, and the attempt to palm off an used ticket on a railway servant, are not separate and distinct offences. 11 C.W.N. 100=4 Cr.L.J. 489=5 C.L.J. 47. J

(b) The intention to cheat him and the railway administration is one and the same offence. (*Ibid.*) K

2.—“Return ticket.”

Return ticket—Transfer—Attempt.

The act of buying an unused half of return-ticket does not in itself amount to an attempt to travel within the meaning of the Indian Railways Act, 1854. Rat. Un. Cr. C. 123. L

113. (1) If a passenger travels in a train without having a

Travelling without pass or ticket, or with insufficient pass or ticket, or beyond authorized distance.

proper pass or a proper ticket with him, or, being in or having alighted from a train, fails or refuses to present for examination, or to deliver up, his pass or ticket immediately on requisition being made therefor under section 69, he shall be liable to pay, on the demand of any railway servant appointed by the railway administration in this behalf, the excess charge hereinafter in this section mentioned, in addition to the ordinary single fare for the distance which he has travelled, or, where there is any doubt as to the station from which he started, the ordinary single fare from the station from which the train originally started, or, if the tickets of passengers travelling in the train have been examined since the original starting of the train, the ordinary single fare from the place where the tickets were examined, or, in case of their having been examined more than once, were last examined.

(2) If a passenger travels or attempts to travel in or on a carriage, or by a train, of a higher class than that for which he has obtained a pass or purchased a ticket, or travels in or on a carriage beyond the place authorized² by his pass or ticket, he shall be liable to pay, on the demand of any railway servant appointed by the Railway administration in this behalf, the excess charge hereinafter in this section mentioned, in addition to any difference between any fare paid by him and the fare payable in respect of such journey as he has made.

(3) The excess charge referred to in sub-section (1) and sub-section (2) shall,—

(a) where the passenger has, immediately after incurring the charge, and before being detected by a railway servant, notified to the railway servant on duty with the train the fact of the charge having been incurred, be one rupee, two annas, or eight annas, and

(b) in any other case, be six rupees, one rupee, or three rupees,

according as the passenger is travelling or has travelled, or has attempted to travel, in a carriage of the highest class, or in a carriage of the lowest class, or in a carriage of any other class or kind ;

Provided that such excess charge shall in no case exceed,—

(a) where the liability to pay it arises under sub-section (1), the amount of the ordinary single fare which the passenger incurring the charge is liable to pay under that sub-section, or,

(b) where such liability arises under sub-section (2), the amount of the difference between the fare paid by the passenger incurring the charge and the fare payable in respect of such journey as he has made.

(4) If a passenger liable to pay the excess charge and fare mentioned in sub-section (1), or the excess charge and any difference of fare mentioned in sub-section (2), fails or refuses to pay the same on demand being made therefore under one or other of those sub-sections, as the case may be, the sum payable by him shall, on application made to any Magistrate by any railway servant appointed by the railway administration in this behalf, be recovered

by the Magistrate from the passenger as if it were a fine³ imposed on the passenger by the Magistrate, and shall, as it is recovered, be paid to the railway administration.

Old Acts.

Act IV of 1879 ... Ss. 31 and 32.

„ XVIII of 1854 .. Ss. 1, 36.

(Notes).

General.

N.B.—See note under Ss. 68-70, *supra*.

(1) Analogous provision.

Cf.—the French and German Railway Law.

M

(2) Applicability of section.

The section applies not to offenders against justice, but ordinarily to innocent persons who “may find themselves in the wrong by mere accident.”

Cr. Appeal No. 98 of 1891, 6th June 1891 (In the Punjab Chief Court).

N

(3) Nature of section.

(a) Certain sections of Ch. IX of this Act deal with offences and their punishment, but this section merely makes certain fares and excess charges recoverable and recoverable in a summary way. (*Ibid.*)

O

(b) The section itself makes it clear what the action of the Magistrate is to be. (*Ibid.*)

P

(c) He must first satisfy himself that the sum claimed is payable by the passenger, *i.e.*, (1) that he has travelled beyond the place authorised by his ticket (or as the case may be), (2) that the excess charge allowed by the section has been demanded by the railway administration in this behalf, and (3) that there has been a failure or refusal by the passenger to comply with the demand. (*Ibid.*)

Q

(d) To satisfy himself on these points, the Magistrate is justified in requiring *prima facie* proof by sworn testimony from the railway administration and, if *prima facie* evidence is forthcoming, in then giving the passenger an opportunity of answering the case set up against him. (*Ibid.*)

R

(e) If a final order is passed by the Magistrate it should simply be to the effect that a stated sum is payable at an excess charge. (*Ibid.*)

S

(f) The Magistrate should not award a sentence of fine, though the sum payable may (if necessary) be recovered as a fine. (*Ibid.*)

T

(4) Demand contemplated by the section.

(a) There is no indication whatever in this section that the—must be made at or within any particular time or period. Cr. Appeal No. 98 of 1891, 6th June 1891 (In the Punjab Chief Court).

U

(b) The Act is simply silent as to the time at which the demand must be made. (*Ibid.*)

V

(c) From this it can be inferred that the demand may be made at any time. (*Ibid.*)

W

General—(Concluded).

(d) The demand when made, must be shown to have been made by a railway servant appointed by the Railway administration in this behalf. *(Ibid.)* X

(e) S. 113 confers the power to demand only on railway servants duly appointed in that behalf, and no Court of Justice can interfere, except (in the case of a Magistrate) to enforce a demand which has been actually made and not complied with. 9 C. P. L. R. 1 (3) (Cr). Y

(5) Duty of Magistrate acting under the section—Revision.

(a) The duty of a Magistrate in disposing of an application made to him under S. 113 for recovery of the excess charge from a passenger for travelling beyond the place authorised by his ticket, considered and explained. 13 P. R. 1891 (Cr). Z

(b) The proceedings of the Magistrate, under the above section, held open to revision under Ss. 435 and 439, Crim. Proc. Code. *(Ibid.)* A.

(6) Order under the section, nature of.

The order under S. 31, Act IV of 1879 (*Cf.* present section), in case of a refusal by a passenger, travelling without a proper ticket, to pay the fare, should be one merely for the recovery of the amount due as the fare, and not an order to pay the sum as if it were due. 12 C. 192. B

(7) Intentionally travelling beyond place of ticket.

(a) S. 112 of the Act is not applicable to the case of a person, who, having entered a carriage with a proper ticket, intentionally or otherwise travels on the strength of that ticket beyond the place authorised by it. 9 C.P.L.R. 1 (Cr). C

(b) The Act appears to contain no provision for the judicial punishment of such a person. *(Ibid.)* D

(c) The only course open to the railway officers is to proceed under S. 113 of the Act. *(Ibid.)* E

(8) Fraudulent acts—Fine—Fare.

(a) S. 32 (d), Act IV of 1879, applies only to fraudulent Acts. Rat. Unrep. Crim. Cas. p. 435. F

(b) And where it appeared that the accused has no intention to defraud, he is not liable under S. 32 to payment of fine as well as the fare, but is liable, under S. 31, to pay the fare found due. *(Ibid.)* G

(9) Passenger by railway—Cheating.

(a) A passenger by railway travelling in a carriage of higher class than that for which he has paid fare is not guilty of cheating under S. 417, I.P.C., but is indictable under the Railway Act. 1 Bom. H.C. 140. H

(c) Where the accused was found guilty of having endeavoured to evade payment of a railway fare by the production of an old pass, altered as to date and number of persons, held that, although Act XVIII of 1864 provides for the punishment of an attempt to evade payment of fare, the accused was in the present instance rightly convicted, not under that Act, but under I.P.C., of an attempt to cheat. 6 P.R. 1868 (Cr.). I

I.—“Sub-section (I).”

(1) Proper ticket.

Semble:—When a ticket is used for a station other than the one for which it was issued,—such ticket containing a condition that if used for any other station it would be forfeited and the full fare charged—, such ticket would not be a—within the meaning of this section. *G.W. Ry. Co. v. Pocock*, 41 L.T. 415. J

(2) Travelling without a ticket, meaning of the expression.

Travelling without a ticket in S. 31, Act IV of 1879 (Cf. present section) must mean travelling without having taken a ticket. *Per Wilson, J.* in 12 C. 192. K

(3) Travelling without ticket, whether an offence.

Under S 113, sub-S. (1) of the Act, it is an offence to travel without a ticket. It is immaterial to consider how many tickets were issued on that particular date. 1 Weir 871. L

(3-a) Travelling without ticket—Season ticket holder.

(a) On demand for examination, a monthly season-ticket must be produced. 12 C. 192. M

(b) So also an annual season-ticket. *Woodard v. Eastern Counties Ry. Co.*, 30 L.J.M.C. 126. N

(c) Every passenger is to show or deliver up his ticket when called upon. 12 C. 192. O

(d) And any passenger who fails in either of these points, is liable, whether a season ticket-holder or not, to pay the ordinary fare for his journey, or, if he cannot show where he got into the train, the ordinary fare from the starting point of the train. (*Ibid.*) P

(e) (i) A passenger, who has a season-ticket which is still in force and in his possession, cannot be said to be travelling without a ticket, merely by reason of his inability to produce it when called upon, on account of his not happening to have the ticket with him, (*Ibid.*) [But this was decided under S. 31 Act IV of 1879, wherein the words “with him” were not found] Q

(ii) But he will be considered not to have shown the ticket, and will have to pay the ordinary fare. (*Ibid.*) R

(3-b) Production of ticket.

A bye-law requiring a passenger to show his ticket when required, does not justify the Company in refusing to carry servants whose tickets have been taken by their master and kept in his possession. *Jennings v. G. W. Ry. Co.*, L.R. 1 Q.B. 7. S

(4) Ticket, obligation on the station-master to issue a—.

There is no—except at the time and place when and where tickets are usually issued. (1 B. 51.) T

1.—“*Sub-section (1)*”—(Concluded).

(5) Passenger not having ticket with him—Refusal to pay fare on demand—Removal.

(a) ENGLISH LAW.

On the removal of a passenger, who has lost his ticket, for failing to produce the ticket, during the journey and for refusing to pay the fare on demand, *held* that, according to the English law, the contract did not by implication authorise the railway servant to remove the plaintiff from the carriage, and that the railway company was liable in an action for damages for assault. *Butler v. M.S. L. Ry. Co.*, L.R. 21 Q.B.D. 207. U

(b) INDIAN LAW.

(i) But according to the——, a railway company would, under such circumstances, be justified in removing a passenger from the carriage. 1 B. 52. Y

(ii) The last portion of S. 2 of the amending Act XXV of 1871, which provides that, in case a passenger does not produce his ticket, he is to pay the fare or increased fare, applies only to cases where the person who has received a ticket will not or cannot produce it, and not, to a person travelling without having paid and obtained a ticket with no intention of defrauding. The absence of a fraudulent intention does not however, make the entry into the carriage less unlawful, or of itself afford any ground for depriving the company of the right of putting an end to such unlawful occupation. 1 B. 52 (57). W

2.—“*Travels...authorized.*”

1) Journey beyond specified station—Return ticket.

(a) A passenger taking a return ticket is only entitled to travel to and from the stations named in the ticket. See *G.W. Ry. Co. v. Peacock*. 41 L. T. 415. X

(b) Where a person took a special excursion ticket from X to Y, and back at a reduced fare the ticket having thereon a condition that, if used for any other station, it would be forfeited and the full fare charged, and journeyed to and returned from Z, a station beyond Y, paying the ordinary fares for the journeys between Y and Z, *held* that, the condition being applicable to station beyond that named on the ticket as well as to intermediate stations, the defendant had used the ticket for a journey to a station other than that named on it, and that the Railway Company could treat the ticket as forfeited. *G. W. Ry. Co. v. Palmer*, (1895) 1 Q.B. 862. Y

2) Knowledge of condition on railway tickets.

(a) In the case of *passenger's tickets*, knowledge of their conditions will be implied, if the party knows or believes that there are conditions on the ticket, although he has not read them. (*Harris v. G. W. Ry.*, 1 Q.B.D. 615; *Parks v. S. E. Ry.*, 2 C.P.D. 416). Z

(b) If, being an intelligent person, he knows, though without reading it, that there is writing or printing thereon, he must be taken to know that such writing embodies conditions. (*Burke v. S. E. Ry.*, 5 C.P.D. 1.) A

2.—“Travels... authorized”—(Concluded).

- (c) If he does not know there is writing or printing thereon, or, though knowing it, does not know (*e.g.* from being an ignorant person, or from the conditions being minute or obscured) that it contains conditions knowledge will not be imputed. *Roberts v. Gen. Steam Co.*, Times, Jan. 24, 1906. **B**
- (d) The inference of knowledge, however, will vary with the nature of the document, *e.g.*, the acceptance of a toll-gate ticket might not imply knowledge of the condition thereon, while that of a bill of lading would. (*Parkes v. S. E. Ry. Co.*, 2 C.P.D. 1). **C**

3.—“Be recovered as if...fine.”

(1) “Shall be recovered as if it were a fine,” meaning of.

- (a) The words “shall be recovered as if it were a fine” in this section only authorise recovery by attachment and sale of immoveable property, and not the infliction of imprisonment in default of payment. 5 N. L.R. 151 (152). **D**
- (b) An amount recoverable as a fine under S. 113 of the Act can only be recovered by attachment and sale of immoveable property. (*Ibid.*) 1 Bom. L.R. 166; 20 M. 388. **E**

(2) Procedure for recovery of fines.

As to——, see Ss. 386—389, Cr.P.C. (Act V of 1898). **F**

(3) Recovery of excess charge.

A Magistrate is not to exercise judicial function when an application is made to him by a duly authorised railway servant to recover the amount of excess fare claimed, but is merely to take the necessary steps to recover it. 1 Burma 606. **G**

(4) Default in payment of excess charge and fare—Powers of Magistrate to impose imprisonment.

- (a) S. 113, Sub-S. 4 (1), directs that on failure to pay on demand excess charge and fare, when due, the amount shall, on application, be received by a Magistrate as if it were due. 20 M. 3=851 Weir 871; (18 B. 440 which has overruled. Rat. Cr. C. 871, *approved*. See also (1 Bom. L.R. 166.) **H**
- (b) The excess charge and fare referred to in S. 113 is not a fine, though it may be recovered as such. (*Ibid.*) **I**
- (c) A Magistrate is not authorised to impose imprisonment in default of payment of the excess charge and fare. (*Ibid.*) See also 1 Bom. L.R. 166. **J**
- (d) The sentence of imprisonment in default of payment of the amount ordered to be paid under S. 113 (4) is not warranted by law. 1 Sindh 130. **K**

(5) S. 5, General Clauses Act 1868—Excess fare—Fine, recovery of—Imprisonment.

- (a) S. 5 of the General Clauses Act, 1868, declares the provisions of Ss. 68 to 70 I.P.C., applicable to all fines imposed under the authority of any Act thereafter to be passed, unless such Act shall contain an express provision to the contrary. Rat. Un. Cr. C. 871. (Overruled by 18 B. 440) **L**

3.—“Be recovered as if . . . fine”—(Concluded).

(b) Hence, a Magistrate ordering, under S. 113 of this Act, payment of excess charge and fare, which under that section is to be recovered as if it were once a fine imposed by him, can award imprisonment in default of payment under S. 64, I P.C. (*Ibid.*) **M**

(6) Travelling without ticket—Imprisonment in default of payment of fine.

Travelling in a train without a proper ticket being an offence under this Act, a Magistrate is not competent to sentence the accused to imprisonment in default of payment of the excess charge and penalty ordered to be paid. 20 A. 95 = A. W. N. (1897) 196 (Referred to in 5 C. L. J. 47 = 11 C. W. N. 100.) **N**

114. If a person sells or attempts to sell, or parts or attempts to part with the possession of, any half of a return ticket, in order to enable any other person to travel therewith, or purchases such half of a return ticket, he shall be punished with fine which may extend to fifty rupees, and, if the purchaser of such half of a return ticket travels or attempts to travel therewith, he shall be punished with an additional fine which may extend to the amount of the single fare for the journey ² authorized by the ticket.

Old Acts.

Act IV of 1879 . . .)
 „ XVIII of 1854 . . .) No corresponding provision.

(Notes).

General.

(1) Analogous provision.

Cf.—the English Bye-law, No. 5. **O**

(2) Applicability of Ss 70, 114 - Sale or transfer of single ticket.

See 1 Weir 872, under S. 70. *supra.* **P**

1.—“Any half.”

“Any half.”

The words “any half” were substituted for the words “the return half” by S. 6 of the Indian Railways Act (1890) Amendment Act, 1896 (IX of 1896). **Q**

2.—“The journey.”

“The journey.”

The words “the journey” were substituted for the words “the return journey” by S. 6 of the Indian Railways Act (1890), Amendment Act, 1896 (IX of 1896). **R**

115. That portion of any fine imposed under section 112 or the last foregoing section which represents the single fare therein mentioned shall, as the fine is recovered, be paid to the railway administration before any portion of the fine is credited to the Government.

Disposal of fines under the two last foregoing sections.

Old Acts.

Act IV of 1879 . . . S. 82.

,, XVIII of 1854 . . . No corresponding provision.

116. If a passenger wilfully alters or defaces his pass or ticket so as to render the date, number, or any material portion thereof illegible, he shall be punished with fine which may extend to fifty rupees.

Altering or defacing pass or ticket.

Old Acts.

Act IV of 1879 , S. 82.

,, XVIII of 1854 . . . No corresponding provision.

S**(Notes).****Analogous provision.**

Cf.—the English Bye-law, No. 4.

T

117. (1) If a person suffering from an infectious or contagious disorder enters or travels upon a railway in contravention of section 71, sub-section (2), he, and any person having charge of him upon the railway when he so entered or travelled thereon, shall be punished with fine which may extend to twenty rupees, in addition to the forfeiture of any fare which either of them may have paid, and of any pass or ticket which either of them may have obtained or purchased, and may be removed from the railway by any railway servant.

Being or suffering person to travel on railway with infectious or contagious disorder.

(2) If any such railway servant as is referred to in section 71, sub-section (2), knowing that a person is suffering from any infectious or contagious disorder, wilfully permits the person to travel upon a railway without arranging for his separation from other passengers, he shall be punished with fine which may extend to one hundred rupees.

Old Acts.

Act IV of 1879 . . .

,, XVIII of 1854 . . . No corresponding provision.

(Note).**Analogous provision.**

Cf.—the English Bye-law, No. 16.

T 1

118. (1) If a passenger enters or leaves, or attempts to enter or leave, any carriage while the train is in motion, or elsewhere than at the side of the carriage adjoining the platform or other place appointed by the railway administration for passengers to enter

Entering carriage in motion, or otherwise improperly travelling on a railway.

or leave the carriage, or opens the side-door of any carriage while the train is in motion, he shall be punished with fine which may extend to twenty rupees.

(2) If a passenger, after being warned by a railway servant to desist, persists in travelling on the roof, steps, or footboard of any carriage, or on an engine, or in any other part of a train not intended for the use of passengers, he shall be punished with fine which may extend to fifty rupees, and may be removed from the railway by any railway servant ¹.

Old Acts.

Act IV of 1879 ... Ss. 33 and 34.
 „ XVIII of 1854 ... S. 4.

(Notes).

General.

(1) Analogous provision.

Cf. the English Bye-law, Nos. 11 and 12.

U

(2) Applicability of section to non-passengers.

Where the accused, a seller of fruit at the platform of a railway station, stood on the foot board of the carriage selling fruit to passengers and continued so to stand after the bell for the departure of the train had been rung, *held*, that the accused, not being a passenger, was not punishable under S. 33 of Act IV of 1879 (S. 119, present Act). ¹ Weir 873.

Y

1.—“ If a passenger....servant.”

(1) Travelling on footboard of railway carriage—Passenger.

A person who without authority travels on the footboard of a railway carriage when the train is in motion, is deemed to be a passenger and is guilty of an offence under S. 218 (2) of the Act. 31 P.R. 1905=146 P.L.R. 1905.

W

(2) Prosecution under Ss. 118 and 122.

- (a) If a person persists in riding on the footboard after prohibition, he is liable to prosecution, under cl. (2) of this section. 5 N.L.R. 151 (189). **X**
- (b) Whilst if there was no such prohibition before he was finally discovered and removed, but he entered on the railway unlawfully, he is liable to prosecution under the first clause of S. 122. (*Ibid.*) **Y**

119. If a male person, knowing a carriage, compartment ¹,

Entering carriage
 or other place reserv-
 ed for females.

room, or other place to be reserved by a railway administration for the exclusive use of females, enters ² the place without lawful excuse, or, having

entered it, remains therein after having been desired by any railway

servant to leave it, he shall be punished with fine which may extend to one hundred rupees, in addition to the forfeiture of any fare which he may have paid, and of any pass or ticket which he may have obtained or purchased, and may be removed from the railway by any railway servant.

Old Acts.

Act IV of 1879 ... S. 37.

„ XVIII of 1854 ... S. 8.

(Notes).

1.—“Compartment.”

See notes under S. 64, *supra*.

Z

2.—“Enters.”

Railway passenger entering compartment reserved for females to assist his wife travelling in that compartment—Interference by Railway police.

The accused entered a compartment of a railway carriage reserved for females to assist his wife who was to travel in that compartment. A constable of the Railway police having interfered and some quarrel having ensued, the accused was charged, and convicted of an offence under S. 332, I.P.C. *Held*, that the conviction was illegal. Entry into compartment reserved for females without lawful excuse is forbidden, but the accused had the best of all excuses for entering the carriage. The constable acted *ultra vires* in interfering, as Railway police are not allowed to do so until they are called upon by the Railway authorities. 76 P.L.R. 1903. A

Drunkenness or
nuisance on a rail-
way.

120. If a person, in any railway carriage or upon any part of a railway ¹,—

(a) is in a state of intoxication ², or

(b) commits any nuisance or act of indecency, or uses obscene or abusive language, or

(c) wilfully and without lawful excuse, interferes with the comfort of any passenger, or extinguishes any lamp,

he shall be punished with fine which may extend to fifty rupees, in addition to the forfeiture of any fare which he may have paid, and of any pass or ticket which he may have obtained or purchased, and may be removed from the railway by any railway servant.

Old Acts.

Act IV of 1879 ... S. 36.

„ XVIII of 1854 ... S. 7.

(Notes).

Analogous provision.

Of the English By-law, No. 9.

1.—“If a person, . . . railway.”

(1) Railway carriage.

A—, while travelling on its journey, is “an open and a public place” or “an open and public place to which the public have, or are permitted to have access.” See *Langrish v. Archer*, L.R. (1892) 10 Q.B.D. 44, cited in 30 B. 348=3 Bom. L. R. 22=3 Cr. L. J. 216. **C**

(2) S. 12, Prevention of Gambling Act (Bom. Act IV of 1887)—Railway carriage.

(a) The word “place” in S. 12 of the Bombay Prevention of Gambling Act, 1887, is qualified by the word “public” and having regard to its context and its position in that context, it must mean a place of the same general character as a “road or thoroughfare,” else, it was pointless to use the words “Streets or thoroughfare,” as they are there used. 30 B. 348=8 Bom. L.R. 22=3 Cr. L. J. 216. **D**

(b) A Railway carriage forming part of a through special train is not a public place within the meaning of S. 12, Act IV of 1887 (Bombay). 30 B. 348=8 Bom. L. R. 22=3 Cr. L. J. 216. **E**

(3) Goods yard—Public place.

The goods yard of a railway station is a place accessible to the public, although the Company’s orders be that men on business alone should be admitted there. 26 B. 607=4 Bom. L. R. 290. **F**

2.—“Is in a state of intoxication.”

Commission of offence under S. 120 (a)—S. 96, I.P.C.—Procedure.

(a) The accused was found drunk in a railway station, which was an offence punishable under S. 120 (a) of the Act. He pleaded guilty, and the Magistrate left him off with a warning. Held, that S. 95, I.P.C., was inapplicable in this case, inasmuch as the Act charged against the accused person amounted to an offence under S. 120(a). 1 N.L.R. 189. **G**

(b) S. 564, Crim. Pro. Code, applies only where a person is convicted of one or certain offences punishable under the Penal Code, and not to an offence under the Railways Act. (*Ibid*). **H**

(c) S. 120 affords no option as to the class of punishment awardable. 1 N.L.R. 139. **I**

121. If a person wilfully obstructs or impedes any railway

Obstructing railway servant in his duty.

servant in the discharge of his duty, he shall be punished with fine which may extend to one hundred rupees.

Old Acts.

Act IV of 1879 . . . S. 38.
“ XVIII of 1854 . . . S. 16.

(Notes).

vision.

16, the Railway Regulation Act, 1940 (3 and 4 Vic., C. 97).

1.—“Obstructing railway servant in his duty.”

(1) Impeding railway servant in the discharge of his duties.

(a) Before a person can be convicted of wilfully obstructing or impeding a railway servant in the discharge of his duties as provided by S. 121 of the Act, or of voluntarily obstructing a public servant in the discharge of his public functions as provided in S. 186, I.P.C., it must be shown that the obstruction or resistance was offered to a railway or public servant in the discharge of his duties or public functions as authorised by law. 1 C.W.N. 74. K

(b) The mere fact of a railway servant believing that he was acting in the discharge of his duties will not be sufficient to make resistance or obstruction to him amount to an offence. (*Ibid.*) L

(c) Of course, if the obstruction or resistance takes the state of an assault or use of criminal force, that may be an offence by itself, but that is an offence of a different nature. (*Ibid.*) M

(2) Resident Engineer—Obstruction—Right of way—Fence.

The accused obstructed the Resident Engineer of a railway company (who was acting under orders of the company) in putting down a line for a fence which would have interfered with the right of way claimed by accused, and was convicted by the District Magistrate for “obstructing a railway servant” under this section. Held, that the legality of the conviction depended on the validity of the accused’s claim to the right of way; for, if that claim was valid, it could not have been the duty of the Resident Engineer to resist it, and the railway company could not, by its orders, make it his duty to do so. Rat. Un. Cr. C. 875. N

(3) S. 260, Cr. P. C.—Summary trial.

An offence under S. 121 of the Act is an offence which is summarily triable within the meaning of S. 260, Cr. P. C. A.W.N. (1902), 24. O

122. (1) If a person unlawfully¹ enters upon a railway, he shall be punished with fine which may extend to twenty rupees.

(2) If a person so entering refuses² to leave the railway on being requested to do so by any railway servant, or by any other person on behalf of the railway administration, he shall be punished with fine which may extend to fifty rupees, and may be removed from the railway by such servant or other person.

Old Acts.

Act IV of 1879 S. 41.
“ XVIII of 1854 S. 17.

(Notes).

(1) Analogous provision.

Of. S. 16, the Railway Regulation Act, 1840 (3 and 4 Vic., C. 97). P

(2) Trespass on railway premises, boundaries not being noticeable.

A conviction under S. 122 is not sustainable, for trespass on railway premises, if the boundaries are not clearly noticeable. (1898) Sind Sader Court Reports, p. 83 (Civ. Criminal Report No. 132 of 1898, Nov. 7, 1898. Q

(3) Police report.

The report under S. 122 of the Act is not a — U.B.R. (1897—1901), Vol. I, p. 54; U. B. R. (1892—1896), Vol. I, pp. 29, 328. R

(4) Ss. 118 and 122, prosecution under.

See 5 N. L. R. 151, cited under S. 118, *supra*.

(5) Power of subordinate Magistrate to impose fine.

(a) By S. 35 of the Railway Act, 1854, district police officers in the Presidency of Bombay could punish, to the extent of the powers conferred on them, in petty offences, any offence made punishable under the Act by fine not exceeding Rs. 20. 3 B.H.C.R. 51 (55) (Cr.) T

(b) But, S. 5, Reg. XII of 1827, and S. 4 of the same regulation being both repealed by Act XVII of 1862, held, that a subordinate Magistrate has no jurisdiction to impose a fine under S. 17 of Railway Act, 1854 (*Cf.* S. 122, present Act). (*Ibid.*) U

1.—“Unlawfully.”

(1) Scope of section.

This section provides *inter alia* “if a person unlawfully enters upon a railway, he shall be punished with fine which may exceed Rs. 20,” and “unlawfully,” seems to mean “without leave of the railway administration.” 30 B. 348 = 9 Bom. L.R. 22 = 2 Cr.L.J. 216. Y

(2) Entry on platform without ticket, whether lawful.

In the absence of any rule or bye-law, entry without ticket on a railway platform is not unlawful within the meaning of S. 122. 1 Sindh 91. W

(3) Entry in exercise of a right.

An—cannot be called unlawful. 22 D., 525 (527). X

(4) Entry on railway premises by dominant owner to effect necessary repairs.

The company, whose servants the accused were, had a mill on one side of the railway line, and a ginning factory on the other, and to bring water from the one to the other, there was a pipe laid beneath the railway line and brick reservoirs at each side to prevent the proper level of the water. The Magistrate had convicted the accused under S. 122 of this Act, because they entered on the railway premises to do some repairs to the pipe and reservoirs, without having first obtained the permission of the railway company to their entry. There was evidence to show that the repairs were necessary. Held that, as the pipe and reservoirs belong to the company and were kept in repair by them, they, as the dominant owner, would have a right to enter on the premises of the railway company, the servient owners, to effect any repairs that might be necessary. The conviction was, therefore, wrong. 22 B. 525. Y

(5) Justices have no jurisdiction when a *bona fide* right is set up.

When a man was charged under S. 16 of the Railway Regulation Act, 1840, with wilfully trespassing on railway premises because he had allowed his van to stand for twenty minutes outside a public house, upon ground which was part of the premises of the railway company whose station was close to the public house, but which was the only access to the public house, and was used by its customers when they went

1.—“*Unlawfully*” (Concluded).

there with vehicles ; it was held by the justices that their jurisdiction was ousted, as the claim to use the ground as a customer of the public house was *bona fide*. And upon a case stated, their conclusion was held to be a proper one. *Wilkinson v. Goffin*, 23 L.T. N. S. 824. Z

(6) Entry upon railway premises not in exercise of a right.

(a) An— or by permission of the railway administration would be unlawful. 30 B. 348 = 3 Bom. L.R. 22 = 2 Cr. L.J. 216. A

(b) Compare *Foulger v. Steadman*, (1872) L.R. 8 Q.B. 65, cited in 30 B. 348, where a cart driver was held not justified in refusing to leave the railway company's premises when required on behalf of the company to do so, although he believed himself entitled to remain thereon because other drivers did so on payment of certain sums to the railway company. B

(7) Right of public to enter the railway lines without permission of railway company.

“ It would be impossible for the railway company to work its lines, were we to hold that the public should have access to them inside the fences without the permission of the Company ” Per *Jenkins, C.J.*, in 30 B. 348 = 3 Bom. L.R. 22 = 3 Cr. L.J. 216. C

Prevention of Gambling (Bombay Act IV of 1887)—Railway carriage forming part of special train—“Public place.”

The word “place” in S. 12 of the Bombay Act IV of 1887 is qualified by the word “public,” and, having regard to its context and its position in that context, it must mean a place of the same general character as a “road or thoroughfare.” A railway carriage forming part of a through special train is not a public place within the meaning of S. 12 of the Act. D

Per *Jenkins, C.J.*—I would be slow to place on the section an interpretation that would curtail its legitimate scope, but I am unable to regard the railway carriage, where the accused was, as possessing such characteristic of, or bearing such a resemblance to, a street or thoroughfare, as to justify us in holding that it was a public place within the meaning of S. 12. E

Per *Russel, J.*—To call or describe either the railway line at the Reversing station, where the train stopped for engine purposes only and where the public could not have any right, without the permission of the railway company, to be on the line at all, or the carriage in a special train, which took no passengers between the two termini of the journey, as coming within any of the terms “public street, place or thoroughfare,” would be to place a wrong interpretation on these words. 30 B. 348 = 3 Bom. L.R. 22 = 3 Cr. L.J. 216. F

2.—“*Refuses*.”

(1) Refusing to desist from trespass.

Where the facts found or that accused, who had legitimate business at the goods shed, attempted to get there by crossing the line, in spite of the prohibition of a railway servant, held, that he could not be convicted under this section. *Ram Narain v. The Empress*, Cr. Revision No. 56 of 1893, Jan. 19 and Feb. 14, 1893. (In the Punjab Chief Court). G

2.—“*Refuses*”—(Concluded).

(2) Justices cannot acquit a driver, when?

The justices cannot acquit a driver, who, after request, to go, wilfully trespasses, upon the railway station on the ground that his exclusion from the station is an undue preference under the Railway and Canal Traffic Act, the remedy under that Act being by application to the Railway Commissioners. *Hole v. Digby*, 27 W.R. 884. H

123. If a driver or conductor of a tramcar, omnibus, carriage, or other vehicle, while upon the premises of a railway, disobeys the reasonable directions of any railway servant or police-officer, he shall be punished with fine which may extend to twenty rupees.

Disobedience of omnibus drivers to directions of railway servants 1.

Old Acts.

Act IV of 1879 ... S. 47.
,, XVIII of 1854 ... No corresponding provision.

(Notes).

Analogous provision.

Cf. S. 16, the Railway Regulation Act, 1840 (3 and 4 Vic., C. 97), and the English Bye-law, No. 17. I

1. —“*Disobedience....servants*”

Cases under S 16, the Railway Regulation Act, 1840, 3 and 4 Vic., C. 97.

- (a) A cab driver who refuses to leave the railway company's premises when requested to do so may be convicted under this section, although he believes he has a right to remain thereon, because other drivers are permitted to do so on payment of certain sums. *Foulger v. Steadman*, L.R. 8 Q.B. 65. J
- (b) A driver refusing to leave the premises after request must be convicted, even though his exclusion may be an undue preference. *Hole v. Digby*, 27 W.R. 884. K
- (c) The justices have no jurisdiction, if a *bona-fide* right to be on the premises in question is set up. *Wilkinson v. Goffr*, 33 L.J. 824. L

Opening of not properly shutting gates.

124. In either of the following cases, namely:—

- (a) if a person, knowing or having reason to believe that an engine or train is approaching along a railway, opens any gates set up on either side of the railway across a road, or passes or attempts to pass, or drives or takes, or attempts to drive or takes any animal, vehicle, or other thing across the railway;
- (b) if, in the absence of a gatekeeper, a person omits to shut and fasten such a gate as aforesaid as soon as he and any animal, vehicle, or other thing under his charge have passed through the gate,

- the person shall be punished with fine which may extend to fifty rupees.

Old Acts.

Act IV of 1879 .. S. 43.

„ XVIII of 1854 .. S. 23.

(Notes).**General.****CLAUSE (b).**

Cf. with S. 75 of the Railway Clauses Act, 1846 (8 Vic., C. 20).

(2) Right to open gates.

An inference that a person may open gates in India, if no engine or train is approaching, may be drawn from the terms of this section. But see *Wyat v. G. W. Ry. Co.*, 6 B. and S. 709, noted under S. 13, *supra*. N

- **125.** (1) ¹ The owner or person in charge of any cattle straying

Cattle-trespass.

on a railway provided with fences suitable for the exclusion of cattle shall be punished with fine which may extend to five rupees for each head of cattle, in addition to any amount which may have been recovered, or may be recoverable under the Cattle-trespass Act, 1871.

(2) ² If any cattle are wilfully driven, or knowingly permitted to be, on any railway otherwise than for the purpose of lawfully crossing the railway, or for any other lawful purpose, the person in charge of the cattle, or, at the option of the railway administration, the owner of the cattle, shall be punished with fine which may extend to ten rupees for each head of cattle, in addition to any amount which may have been recovered or may be recoverable under the Cattle-trespass Act, 1871.

(3) ³ Any fine imposed under this section may, if the Court so directs, be recovered in manner provided by section 25 of the Cattle-trespass Act, 1871.

(4) The expression “public road” in sections 11 and 26 of the Cattle-trespass Act, 1871 ⁴, shall be deemed to include a railway, and any railway servant may exercise the powers conferred on officers of police by the former of those sections.

(5) The word “cattle” ⁵ has the same meaning in this section as in the Cattle-trespass Act, 1871.

Old Act's.

Act IV of 1879 .. S. 42.
 „ XVIII of 1854 .. Ss. 18, 19 and 20.

(Notes).**General.****(1) Scope of section.**

This section recognizes the obligation of the owner to prevent the cattle from straying, while at the same time it provides that the negligence of the person in charge may be punished, 18 M. (228) (229) = 1 Weir 874. O

(2) Fence—Fine—Information.

No order fining a party for not repairing a fence ought to be passed, without an information against him and a hearing. 23 W.R. 63 (Cr.). F

(3) State of fence—Evidence re.

Prior to a conviction under this section, the state of the fences, it seems, must be specifically proved. 8 M.H.C.R. App. 1. Q

I.—“ Sub-section (1).”**(1) Scope of sub-S. (1).**

S. 125, cl. (1) of this Act makes punishable the negligence of the owner or person in charge of any cattle which stray upon the line. 18 M. 228 (229) = 1 Weir 874. R

(2) Owner of cattle is not liable to a fine.

Unless it is shown that the owner himself was guilty in permitting the cattle to stray on the railway line, the—. 18 M. 228 = 1 Weir 874. S

(3) Allowing cattle to stray on Railway line.

The defendant was convicted of being the owner of cattle which strayed on a railway provided with fences. On the date of the offence, no rules had been published under S. 1 of the Railway Act, Amendment Act (XXV of 1871), determining what kind of fences should be deemed to be suitable for the exclusion of the cattle. No evidence was offered as to the state of the fences, and the conviction proceeded solely on the confession of the prisoner that he was the owner of the cow. *Held*, that the conviction was wrong, as the state of the fences was in this case a matter requiring specific proof. 1 Weir 874. T

(4) Permitting cattle to stray on railway—Respective liability of owner and person in charge of cattle—Discretion of Magistrate.

Where, owing to the negligence of the person in charge of any cattle, the cattle is allowed to stray on a railway, there is nothing in cl. (1) of the section to restrict the discretion of the Court in ascertaining whether the owner or the person in charge is guilty, and awarding punishment accordingly. 18 M. 228 = 1 Weir 874. U

(5) Fines for cattle impounded.

For every head of cattle impounded, the pound-keeper shall levy a fine according to the following scale.

Elephant	Two rupees.
Camel or Buffalo	Eight annas.
Horse, mare, gelding, pony, colt, filly, mule, bull, bullock, cow or heifer .. .	Four annas.
Calf, ass or pig	Two annas.
Ram, ewe, sheep, lamb, goat or kid	One anna. (See S. 12 Act I of 1871.)

2.—“*Sub-section (2).*”

Scope of cl. (2).

- (a) Under the second clause, which makes punishable wilful acts of driving or knowingly permitting cattle to be upon a railway line, the railway authorities are given the option to prosecute the owner instead of the person in charge. 18 M. 228 = 1 W. 874. W
- (b) This provision is of a very penal character, and removes the discretion as to the person to be held liable to punishment from the Court to the Railway authorities. (*Ibid.*) X
- (c) No such discretion is given to the railway administration, when the straying of cattle has been through negligence. (*Ibid.*) Y
- (d) There is nothing to restrict the power and duty of the Magistrate to ascertain in such cases whether the person charged has himself been guilty. (*Ibid.*) Z

3.—“*Sub-section (3)*”

Recovery of penalty for mischief committed by causing cattle to trespass on land.

Any fine imposed [under the next following section, or] for the offence of mischief by causing cattle to trespass on any land, may be recovered by sale of all or any of the cattle by which the trespass was committed, whether they were seized in the act of trespassing or not, and whether they are the property of the person convicted of the offence or were only in his charge when the trespass was committed. (S. 25, Act I of 1871) A

4.—“*The expression... 1871.*”(1) **Cattle damaging public roads, canals and embankments.**

Persons in charge of public roads, pleasure grounds, plantations, canals, drainage works, embankments and the like, and officers of police, may seize or cause to be seized any cattle doing damage to such roads, grounds, plantations, canals, drainage works, embankments and the like, or the sides or slopes of such roads, canals, drainage works or embankments, or found straying thereon, and shall send them or cause them to be sent, within twenty-four hours, to the nearest pound. (S. 11, Act V of 1871.) B

(2) **Penalty for damage caused to land or crops or public roads by pigs, &c.**

Any owner or keeper of pigs who, through neglect or otherwise, damages or causes or permits to be damaged any land, or any crop or produce of land or any public road, by allowing such pigs to trespass thereon, shall, on conviction before a Magistrate, be punished with fine not exceeding ten rupees.

The Local Government, by notification in the Official Gazette, may, from time to time, with respect to any local area specified in the notification, direct that the foregoing portion of this section shall be read as if it had reference to cattle generally, or to cattle of a kind described in the notification, instead of to pigs only, or as if the words “fifty rupees” were substituted for the words “ten rupees,” or as if there were both such reference and such substitution.

The Local Government may, at any time, by notification in the Official Gazette cancel or vary a notification under this section. (See S. 26, Act I of 1871.) C

5.—“Cattle.”

Cattle, scope of the term

“Cattle” includes also elephants, camels, buffaloes, horses, mares, geldings, ponies, colts, fillies, mules, asses, pigs, rams, ewes, heep, lambs, goats and kids. **D**

Maliciously wrecking or attempting to wreck a train ¹.

126. If a person unlawfully—

- (a) puts or throws upon or across any railway any wood, stone, or other matter or thing, or
- (b) takes up, removes, loosens, or displaces any rail, sleeper, or other matter or thing belonging to any railway, or
- (c) turns, moves, unlocks, or diverts any points or other machinery belonging to any railway, or
- (d) makes or shows, or hides or removes, any signal or light upon or near to any railway, or
- (e) does or causes to be done, or attempts to do, any other act or thing in relation to any railway,

with intent, or with knowledge that he is likely, to endanger the safety of any person travelling or being upon the railway, he shall be punished with transportation for life, or with imprisonment for a term which may extend to ten years.

Old Acts.

Act IV of 1879,
„ XVIII of 1854

} No corresponding provision.

(Notes).

Analogue provision.

Cf S. 32 of the offences against the Person Act, 1861 (24 and 25 Vict., c. 100). **E**

1.—“Maliciously....train.”

(1) Offence under the section, what constitutes.

Where the accused unlocked and turned the hour-table at a railway station, *held*, that the accused was guilty of an offence under S. 126, although, in the circumstances of the case, there was little likelihood of injury being caused by him, no engines being on either side of the line just then. ¹ Weir 875. **F.**

(2) Rails—Stones, placing of.

A person charged with having placed a stone on the rails under S. 126 of the Act cannot be allowed to plead that no train was due at the time. Rat. Un. Cr. C. 829 (19 B. 715, *appl.*; 11 Bom. H.C. 244; 14 B. 260, *R.*) **G**

(3) Unlawful removing of rails—Wrecking of the train—Dacoity.

See *Marudai Muthu Konvrayan v. The Empress*, Criminal Appeal No. 36 of 1892, 10th June 1892. (In the Madras High Court.) **H**

(4) Accused confessing he knew a plot to remove rails.

The accused confessed that he knew of the plot to remove the rails and that he kept watch while the act was being done. *Held*, that the action of the accused amounted to abetment of the offence mentioned in S. 126. 1 Bom. L.R. 682. **I.**

127. If a person unlawfully throws or causes to fall or strike

Maliciously hurt-
ing or attempting to
hurt persons travel-
ling by railway.

at, against, into, or upon any rolling-stock form-
ing part of a train any wood, stone, or other
matter or thing, with intent, or with knowledge

that he is likely, to endanger the safety of any
person being in or upon such rolling-stock, or in or upon any other
rolling-stock forming part of the same train; he shall be punished
with transportation for life, or with imprisonment for a term which
may extend to ten years

Old Acts.

Act IV of 1879. }
„ XVIII of 1854. } No corresponding provision.

(Notes).

General.

(1) Analogous provisions.

Cf. S. 38 of the offences against the Person Act, 1861 (24 & 25 Vict. c. 100). J

(2) Offence under S. 127.

(a) An— of the Act is punishable with transportation for life or with impris-
onment for a term which may extend to ten years. 14 C.P.L.R. 176. K

(b) It is, therefore, triable only by a Court of Session or by a Magistrate special-
ly invested with powers under S. 30, Crim. Pro. Code. (*Ibid.*) L

(3) Accused, of thirteen or fourteen years of age—Whipping.

An accused of thirteen or fourteen years of age, convicted under S. 127 of the
Act, cannot be punished with whipping. 11 C.P.L.R. 8 (Cr.). M

128. If a person, by any unlawful act, or by any wilful omis-

Endangering safety
of persons travel-
ling by railway by
wilful act or omis-
sion.

sion or neglect, endangers or causes to be endangere-
d the safety of any person travelling or being
upon any railway, or obstructs or causes to be
obstructed, or attempts to obstruct¹, any rolling-

stock upon any railway, he shall be punished with imprisonment
for a term which may extend to two years.

Old Acts.

Act IV of 1879. S. 45.
„ XVIII of 1854. S. 25.

(Notes).

General.

(1) Analogous provision.

Cf.—S. 34 of the Offences against the Person Act, 1861 (24 and 25, Vict. c. 100).
and, S. 36 of the Malicious Injuries to Property Act, 1861 (24 and 25 Vict., c.

General—(Concluded).

(2) Offence under S. 128—Misjoinder of charge—S. 225, I. P. C.

An offence under S. 128 and the offence of rescuing the person arrested for the former offence, i.e., an offence under S. 225, I.P.C., are distinct offences, and must be tried separately. 29 C. 385 = 6 C. W. N. 468. O

(3) Madras Act III of 1865—Jurisdiction of Magistrates.

Where an accused was tried and convicted by a Sub-Magistrate of an offence under S. 25, Act XVIII of 1854, punishable with transportation for life or imprisonment for any term not exceeding 7 years, *held* that, by virtue of Mad. Act III of 1865, the Sub-Magistrate had jurisdiction, that Act not being repealed by the Schedule to Act VIII of 1869. 7 M. H. C. App. VIII. P

(4) Knowledge.

The accused in this case was convicted of an offence under S. 45, Act IV of 1879 (*Cf.* present section) on the following finding of facts "That the accused was in charge of K station. that it was his duty before despatching the down mail to obtain line-clear message from S, that he did not do so, but concocted one and made it appear as if it had been received in due course, that he handed it to the driver of the mail as the warrant to proceed on the journey." *Held*, that there was no evidence to justify the inference of the knowledge required by S. 45. 2 A. W. N. 172. Q

1.—"Obstructs...obstruct."

(1) Obstruction, what is—Altering signals.

(a) Prisoner altered the arms of a signal and the colour of two "distant" signal lights, with the result that the driver of a train slackened speed and nearly brought the train to a stand still causing delay. It was held that this was an obstruction. *R. v. Heddie* (1870), L. R. 1 C. C. R. 253.

Kelly C. B.—"There was as much an obstruction as if a log of wood had been placed across the rails."

Barin Martin, however, dissented from the view of the majority, considering it to be straining the meaning of the section to hold that stopping a train by changing the signals was an "obstruction." R

(b) So also, where a man caused a goods train, on which he wished to ride, to slacken speed by holding up his hands, as the officials do, it was held to be an obstruction. *R. v. Hardy* (1871), L.R. 1 C.C.R. 273. S

(2) Placing obstruction on the rails—Unlawful Act.

The accused was charged under S. 46 of the Railways Act, 1879, with pulling up an iron mile post and placing it across the rails. It was done in the dusk of the evening, and the mail train might have been derailed. The District Magistrate was of opinion that S. 45 of the Act applied and referred the case to the High Court. *Held*, that the trying Magistrate did not give sufficient consideration to the principle that, when an act unlawful in itself is wilfully done rashness cannot be usually predicated, and that, therefore, the accused should be committed to the Court of Session on a charge under S. 45. Rat. Un. Cr.C. 459. T

129. If a person rashly or negligently does any act, or omits to do what he is legally bound to do, and the act or omission is likely to endanger the safety of any person travelling or being upon a railway, he shall be punished with imprisonment for a term which may extend to one year, or with fine, or with both.

Endangering safety of persons travelling by railway by rash or negligent act or omission 1.

Old Acts.

Act IV of 1879 ... S. 46.

„ XVIII of 1854 ... S. 28.

(Notes).

1.—“Endangering... omission.”

Endangering safety of persons travelling on railway.

A person who fails to remove a stone from a rail is not guilty of negligently doing an act which is likely to endanger the safety of persons travelling on the railway under S. 46, Act IV of 1879, unless it be proved that he was legally bound to remove it. Rat. Un. Cr. C. 394. U

130. (1) If a minor under the age of twelve years, is with respect to any railway, guilty of any of the acts or omissions mentioned or referred to in any of the four last foregoing sections, he shall be deemed, notwithstanding anything in section 82 or section 83 of the Indian Penal Code, to have committed an offence, and the Court convicting him may, if it thinks fit, direct that the minor, if a male, shall be punished with whipping, or may require the father or guardian of the minor to execute, within such time as the Court may fix, a bond binding himself, in such penalty as the Court directs, to prevent the minor from being again guilty of any of those acts or omissions.

Special provision with respect to the commission by children of acts endangering safety of persons travelling by railway.

(2) The amount of the bond, if forfeited, shall be recoverable by the Court as if it were a fine imposed by itself.

(3) If a father or guardian fails to execute a bond under subsection (1) within the time fixed by the Court, he shall be punished with fine which may extend to fifty rupees.

Old Acts.

Act IV of 1879 ... S. 44.

„ XVIII of 1854 ... No corresponding provision.

(Notes).

General.

Scope of section.

(a) S. 130 of the Act requires the accused to be minors under twelve years of age. 11 C.P.L.R. 8 (Cr.).

General—(Concluded).

- (b) Where the accused who were described as boys of 13 or 14 years of age were convicted under S. 127, *infra*, and were sentenced each to a whipping of 12 stripes, *held*, that the accused were not punishable with whipping under S. 130 of the Act, because they were not minors under 12 years of age. (*Ibid.*) W

(2) Offences under S. 127, read with S. 130 of the Act.

See 14 C.P.L.R. 176, noted under S. 127, *supra*. X

Procedure.

131. (1) If a person commits any offence mentioned in section 100, 101, 119, 120, 121, 126, 127, 128, or 129, or in section 130, sub-section (1), he may be arrested, without warrant or other written authority, by any railway servant or police-officer, or by any other person whom such servant or officer may call to his aid.

(2) A person so arrested shall, with the least possible delay, be taken before a Magistrate having authority to try him, or commit him for trial.

Old Acts.

Act IV of 1879 . . . S. 49.

„ XVIII of 1854 . . . S. 37.

(Notes).

General.

(1) Execution of the warrant for arrest.

Special orders have been issued by the Government of India regarding the execution of a warrant for the arrest of a railway servant which would probably apply equally to an arrest without warrant by a police-officer. If the person, whose duty it is to arrest, finds that the immediate arrest of the railway servant would occasion risk and inconvenience to the public, the police officer shall make arrangements to prevent escape and apply to the proper quarter to have such servant relieved, deferring arrest until he is relieved. Government of India, June 20 1877, Bengal Pol. Cir. July 27, 1877, Bom. B.K. Cir. p. 4. Y

(2) Railway lines passing through independent states—British jurisdiction—Effect of Government notification.

(a) The territory on which the Nizam's State Railway is constructed has been, and continues to be part of the Dominion of the Nizam. 25 C. 20=24 I. A. 137=2 C. W. N. (P.C.) 1. Z

(b) The authority, therefore, to execute any criminal process there, must be derived in some way or other from the Nizam (the Sovereign of that Territory). (*Ibid.*) A

(c) Notification in the Gazette of India by the Government of India could give no such authority, but it could only give effect to the extent in which the Nizam had permitted the British Government to make the notification. (*Ibid.*) B

General—(Concluded).

(3) Grant of jurisdiction to British Government over Railway line through independent states—Extent of jurisdiction—Criminal Courts.

(a) In the absence of any express treaty and words which, in themselves, precisely define the amount of jurisdiction intended to be conveyed by the Nizam to the British Government, reference should be made to the correspondence which passed between the two Governments.

(Ibid.)

(b) On such reference, it is clear that the only jurisdiction that has been granted is civil and criminal jurisdiction along the line of Railway as in the case on other lines running through independent states. (Ibid.)

(c) Therefore, an arrest of a person for an offence committed in British territory and not committed on the railway or in any way connected with the administration of the Railway line merely because he was physically present on a portion of that of the Railway, would not be legal. (Ibid.)

(4) S. 122 of the Act.

—is not one of those mentioned in S. 131 which confers the power of arresting without warrant for certain offences under the Act, and the procedure applicable to non-cognizable cases must be followed. U.B.R. (1897--1901), Vol. 1 p. 54.

132. (1) If a person commits any offence under this Act, other than an offence mentioned in the last foregoing section, or fails or refuses to pay any excess charge or other sum demanded under section 113, and there is reason to believe that he will abscond, or his name and address are unknown, and he refuses on demand to give his name and address, or there is reason to believe that the name or address given by him is incorrect¹, any railway servant or police-officer, or any other person whom such railway servant or police officer may call to his aid, may, without warrant or other written authority, arrest him.

Arrest of persons likely to abscond or unknown.

(2) The person arrested shall be released on his giving bail, or, if his true name and address are ascertained, on his executing a bond without sureties, for his appearance before a Magistrate when required.

(3) If the person cannot give bail, and his true name and address are not ascertained, he shall, with the least possible delay, be taken before the nearest Magistrate having jurisdiction.

(4) The provisions of Chapters XXXIX, and XLII of the Code of Criminal Procedure, 1882, shall, so far as may be, apply to bail given, and bonds executed, under this section.

Old Acts.

Act IV of 1879 .. S. 48.

.. XVIII of 1854 .. S. 24.

(Notes).

Analogous provision.

Cf. S. 154, the Companies Clauses Act, 1845 (8 and 9 Vict., c. 16) and S. 5 (2), the Regulation of Railways Act, 1889 52 and 53 Vict., c. 57). **G**

1.—“ There is reason . . . incorrect.”

Passenger giving his correct name and address—Detention—English law.

A passenger giving his correct name and address, cannot be detained pending inquiries as to the correctness of the information, though his conduct is such as to give reasonable and probable cause for the belief that such information is false. *Knights v. L.C. and D. Ry. Co.*, 62 L J. Q.B. 378.

133. No Magistrate other than a Presidency Magistrate, or than a Magistrate whose powers are not less than those of a Magistrate of the second class, shall try any offence under this Act.

Magistrates having jurisdiction under Act 1.

Old Acts.

Act IV of 1879 . . S. 50, cl. (1).

„ XVIII of 1854 . . Ss. 26 and 30.

(Notes).

1.—“ Magistrates . . . Act.”

(1) Offences under the Railways Act—Magistrates empowered to try.

Under S. 133 of the Act, offences under the Act cannot be tried by a Magistrate of the third class. *U.B.R. (1897-1901), Vol. I (Cr.)*, p. 371. **H**

(2) S. 2. Crim. Pro. Code, 1872—Offences—Trial—Magistrate—Jurisdiction.

S. 30 of Act XVIII of 1854, and S. 2, Crim. Pro. Code, 1872, show that offences under the Railways Act, punishable with a fine exceeding twenty rupees, are not triable by Magistrates inferior to a Magistrate of the first class. *Rat. Unrep. Crim. Cas.* 83. **I**

(3) Offence under the section.

A Sessions Judge has no authority to direct a fresh trial of a charge of an offence under S. 26 of the Railways Act, 1854, (*cf.* present section) which has been dismissed by the Magistrate. 6 M.H.C. App. XLI. **J**

(4) Jurisdiction of Magistrates—Madras Act III of 1865, S. 1.

(a) Although all offences under S. 26, Act XVIII of 1854 (*cf.* present section) should, under that Act, be committed to the Sessions, yet S. 1 of the Madras Act III of 1865 operates to remove this bar to the Magistrate's jurisdiction and renders every Magistrate competent to take cognizance of offences against any special or local law, notwithstanding any provision to the contrary in any Act or Regulation, provided only that the several grades of Magistrates do not exceed the limits of their ordinary jurisdiction as to the amount of punishment they may inflict. 4 M.H.C.R. App. IX. **K**

(b) The schedule of the Crim. Pro. Code, 1869, made no alteration in this respect. 7 M.H.C.R. App. VIII. **L**

1.—“Magistrates....Act”—(Concluded).

(c) Madras Act III of 1865 is not repealed by the Schedule to Act VIII of 1869.
(*Ibid.*) M

(5) Conviction by full-power Magistrate.

A—under S. 26, Act XVIII of 1854 (*cf.* present section) is illegal for want of jurisdiction, 3 Bom.H.C.R. 10 (Cr.). N

134. (1) Any person committing any offence against this Act or any rule thereunder shall be triable for such offence in any place in which he may be, or which the Local Government may notify in this behalf, as well as in any other place in which he might be tried under any law for the time being in force.

(2) Every notification under sub-section (1) shall be published in the local official Gazette, and a copy thereof shall be exhibited for the information of the public in some conspicuous place at each of such railway stations as the Local Government may direct.

Old Acts.

Act IV of 1879 .. S. 50, cls. (2) and (3).

„ XVIII of 1854... No corresponding provision.

(Notes).

1.—“Place of trial.”

(1) Notification issued under this power.

For instances of—, see Supplement to Assam R. M.

Assam Gazette, 1898, Pt. II, p. 134, and *ibid.*, 1901, Pt. II, p. 482, Gazette of India, 1899, Pt. I, p. 265.

Bengal Statutory Rules and Orders, Vol. I, and Calcutta Gazette, 1907, p. 202; and U. P. List of Local Rules and Orders, Vol. I, and U. P. Gazette, 1906, Pt. I, p. 903. O

(2) Offences against Railway.

(a) The Bengal Government has issued several notifications. Certain places have been appointed for trials of offences committed on the following railways so far as they run within Bengal :

1. The East Indian Ry. including the Azimgunge branch.

2. The Eastern Bengal State Ry.

3. The Northern Bengal State Ry.

4. The Bengal Central Ry.

5. The Darjeeling Himalayan Ry.

6. The Dacca Mymensingh State Ry.

7. The Patna Gaya State Ry.

8. The Tirhut State Ry.

9. The Bengal North Western Ry.

10. The Assam-Bihar State Ry.

11. The Bengal Nagpur Ry. (See Cal. Gaz., 1892, Pt. I, p. 1111.)

1.—“Place of trial”—(Concluded).

- (b) Offences committed on the Cooch Behar Ry., are triable at Alipur in the District of Jalpaiguri (Cal. Gaz., 1900, Pt. I, p. 1260). Q
 - (c) At Motiharee, if committed at the Marwhal Station (Cal. Gaz., 1893, Pt. I, p. 345). R
 - (d) At Sealdah, if committed on the Bracebridge Hall Ry. (Cal. Gaz., 1901, Pt. I, p. 1165). S
- (3) **Ss. 106, 107 and 134—Jurisdiction of Criminal Court—Goods sent by Railway from Karachi to Lahore—False description of goods—Loss in freight caused to Railway administration—Cheating.**

(a) One G.A. at Lahore wrote to one A.A. at Karachi instructing him to send certain goods from Karachi to Lahore by the North Western Railway under false description, with the object of inducing the said railway administration to carry the goods to, and deliver them at, Lahore at a lower rate than would have been charged had the goods been correctly described, and G.A. took delivery at Lahore of goods sent by A.A. from Karachi in consequence of those instructions, without paying the difference between the rate charged and the correct rate, and thereby defrauded the administration of the amount by which the correct rate exceeded the rate charged. It was alleged that G.A. always charged A.A. with freight of the goods despatched to Lahore, and it was admitted that on one occasion at least freight was paid by G.A. at Lahore, while in the other instances it was paid by A.A. at Karachi. A.A. was brought from Karachi to Lahore to there stand his trial with G.A. for offence under the Railways Act, and for cheating and abetment thereof, and the question was whether the accused, or either of them, could be tried at Lahore. *Held* that, as regards the offence of cheating, S. 179, Cr.P.C., conferred on the Court at Lahore jurisdiction by reason of the loss in freight being caused to the Railway administration at Lahore where its head quarters are. *Held* also that, on the facts alleged, the offence of cheating was committed by G.A. at Lahore when the administration was induced, by his dishonest concealment of the fact that the goods consigned had been misdescribed, to deliver the same to him without receiving full payment for carrying charges, while the same offence was committed by A.A. at Karachi. 7 P.R. 1890 (Cr.). T

(b) As regards the alleged offence under Railway Act, S. 107, *held*, that G.A. might be tried at Lahore under either S. 134 of the Railway Act, or S. 180, ill. (a), Crim. Pro. Code, but that A.A. could not be tried at Lahore. (*Ibid.*) "

CHAPTER X

SUPPLEMENTAL PROVISIONS.

135. Notwithstanding anything to the contrary in any enactment,

Taxation of railways by local authorities 1.

ment, or in any agreement or award based on any enactment, the following rules shall regulate the levy of taxes in respect of railways, and from railway administrations in aid of the funds of local authorities, namely—

(1) A railway administration shall not be liable to pay any tax in aid of the funds of any local authority, unless the Governor-General in Council has, by notification in the official Gazette, declared the railway administration to be liable to pay the tax.

(2) While a notification of the Governor-General in Council under clause (1) of this section is in force, the railway administration shall be liable to pay to the local authority either the tax mentioned in the notification, or, in lieu thereof, such sum, if any, as an officer appointed in this behalf by the Governor-General in Council may, having regard to all the circumstances of the case, from time to time determine to be fair and reasonable.

(3) The Governor-General in Council may, at any time, revoke or vary a notification under clause (1) of this section.

(4) Nothing in this section is to be construed as debarring any railway administration from entering into a contract with any local authority for the supply of water or light, or for the scavenging of railway premises, or for any other service which the local authority may be rendering, or be prepared to render, within any part of the local area under its control.

(5) "Local authority" in this section means a local authority as defined in the General Clauses Act, 1887, and includes any authority legally entitled to, or entrusted with, the control or management of any fund for the maintenance of watchmen, or for the conservancy of a river.

Old Act.

This section is new.

(Notes).

General.

Section—Scope of.

In this section it is proposed to deal with the question of the taxation of railways by Municipal Committees, Cantonment Committees, District Boards and other like authorities. In the opinion of the Government of India, the exemption which guaranteed and State Railways enjoy in some Provinces from assessment to local rates on land should be extended to all railways throughout India. As regards Municipal taxes, it is considered that such as have been levied hitherto in any municipality or cantonment may generally continue to be levied there, though possibly in a commuted form. (See Statement of Objects and Reasons).

1.—“Taxation of railways by local authorities.”

(1) Notification under this section.

For—, declaring every railway administration to be liable to pay every tax which it is lawfully required to pay by or on behalf of any local authority in aid of the funds of such authority. See Gazette of India, 1907, Pt. I, p. 1075. **W**

(2) Notification imposing water-rates.

For—on the East Indian Railway in respect of certain municipalities, see Gazette of India, 1893 and 1894, Pt. I, pp. 358 and 438 respectively. **X**

(3) Notification declaring that certain railway companies shall pay certain taxes.

For—to certain municipalities, see Mad. Rules and Orders, Vol. I. **Y**

(4) Notification declaring that the administration of Burma Railways shall be liable to tax.

For—in respect of its property within the Rangoon Municipality, see Gazette of India, 1906, Pt. p. 811. **Z**

(5) “Local authority.”

“Local authority”—Definition. See T at p. 20, *supra*. **A**

(6) Principle of rating in Bombay.

(a) In Bombay “the principle upon which the Railway Company is liable to be rated as occupiers is to take the gross earnings of the portion of the line which is within City (Island) of Bombay, and to make thereupon the following deductions —

1. The expenses of working that portion of the line.
2. The repairs of rolling-stock, etc., used on that portion of the line.
3. An allowance for renewal of it.
4. An allowance for a compensation fund.
5. Interest upon the capital necessary for working that portion of the line.
6. Tenant's profit on that capital. 9 B.H.C. 217. **B**

(b) “But income-tax is not a proper deduction” (*Ibid*). See also *Reg. v. The Southampton Dock Co*, 14 Q.B. 587 (611); *Reg. v. The Great Western Ry. Co.*, 6 Q. B. D. 179 (205). **C**

(c) “If an allowance be made for depreciation of rolling-stock, the fact of such an allowance having been made should be taken into consideration in fixing the rate of tenant's profits.” (*Ibid*). **D**

(7) Municipal land Tax, liability of Railway Company to pay.

Where the Government had made over, to a Railway Company, free from all charges and for a number of years, the land required for the Company's Railway, the Government and not the Railway Company constitute the “owners” of such land within the scope of the Bombay Municipal Act, but the latter admittedly liable as “occupiers” could be rated as such by the Municipality in respect of their net earnings from the portion of the Railway line within its jurisdiction. 9 B.H. C.B. 217. **E**

1.—“Taxation of railways by local authorities” —(Concluded).

(8) Liability to tax under different municipalities.

A Railway Company exercising their profession or carrying on their business as such company within the limits of more than one Municipality is not liable to pay profession tax to all such municipalities; under the Municipal Act, a person cannot be compelled by one Municipality to pay a certain tax, if he can prove that he has paid such tax for the same half-year in any other Municipality. 13 M. 78. F

(9) Wrongful assessment—Suit to recover money illegally levied—Small Cause Court—Jurisdiction.

(a) When profession tax has once been paid in one Municipality and subsequently for the same period the tax is collected under protest a second time by another Municipality, the tax-payer is entitled to sue the latter Municipality for a refund of the money wrongfully collected from him. 13 M. 78. G

(b) The suit will lie in the Civil Court, and, if the amount is within the pecuniary limits of a Small Cause Court, such a suit will lie in the Small Cause Court. (*Ibid.*) H

136. (1) None of the rolling-stock, machinery, plant, tools, fittings, materials, or effects used or provided by a railway administration for the purpose of the traffic on its railway, or of its stations or workshops, shall be liable to be taken in execution¹ of any decree or order of any Court without the previous sanction of the Governor-General in Council.

Restriction on execution against railway property.

(2) Nothing in sub-section (1) is to be construed as affecting the authority of any Court to attach² the earnings of a railway in execution of a decree or order.

Old Acts.

This section is new.

(Notes).

General.

(1) Analogous provision.

Cf. S. 4, the Railway Companies Act, 1867 (30 & 31 Vic., c. 127). I

(2) Necessity for section.

The necessity for such a section as this was illustrated recently by the attachment in the North-Western Provinces, at the instance of a private decree-holder, of the engine attached to the mail-trains. (See State-ments of Objects and Reasons). J

(3) Section, protection afforded by.

(a) The protection afforded by the section from seizure in execution of its property after the opening of the railway for public traffic continues, even though the railway is subsequently closed for traffic. *Midland Wagon Co. v. Potteries, etc., Rg. Co.*, L.R. 6 Q.B.D. 36. K

General²—(Concluded).

(b) The above applies although the railway happens to be simply a subordinate part auxiliary to the main undertaking. *G.N. Ry^o Co. v. Tahourdin*, L.R. 13 Q.B.D. 320. **L**

(c) But the Railway Company ought to have commenced to acquire land or to construct its railway. *In re Birmingham & Lichfield Junction Ry. Co.*, L.R. 13 Ch. D.V. 155. **M**

1.—“Or of any local authority....taken in execution.”

N.B.—These words were added by the Indian Railways Act (1890) Amendment Act, 1896 (IX of 1896), S. 7. **N**

2.—“To attach.”

(1) Attachment in execution of decrees.

As to—, see S. 60, O. XXI, rr. 41, 46, 48, 50; S. 62, O. XXI, rr. 52—55, S. 64, O. XXI, rr. 56, 58—64 and S. 63, Act V of 1908 (C.P.C.). **O**

(2) Appointment of receivers.

As to—, see O. XL, rr. 1—3 and 5. (*Ibid*). **P**

Railway servants to be public servants for the purposes of Chapter IX of the Indian Penal Code.

137. (1) Every railway servant shall be deemed to be a public servant for the purposes of Chapter IX of the Indian Penal Code¹.

(2) In the definition of “legal remuneration”² in section 161 of that Code, the word “Government” shall, for the purposes of sub-section (1) be deemed to include any employer of a railway servant as such.

(3) A railway servant shall not—

(a) purchase or bid for, either in person or by agent, in his own name or in that of another, or jointly or in shares with others, any property put up to auction under section 55 or section 56, or

(b) in contravention of any direction of the railway administration in this behalf, engage in trade.

(4) Notwithstanding anything in section 21 of the Indian Penal Code, a railway servant shall not be deemed to be a public servant for any of the purposes of that Code except those mentioned in sub-section (1).

Old Acts.

Act IV of 1879 .. S. 27.

„ XVIII of 1854 .. No corresponding provision

(Notes).

General.

(1) Origin of section.

For—, see Pros. Foreign Dept., Ext., Nov. 1887, Nos. 145 to 158. **Q**

General— (Concluded).

(2) Expansion of S. 27, Act IV of 1879.

The— (cf. present section), has been suggested by a case in which a railway servant engaged, in contravention of rules which were binding on him, to the prejudice of the railway administration which he was serving. (See Statement of Objects and Reasons). R

1.—“For the purpose of chapter IX, Indian Penal Code.”

(1) Chapter IX, I.P.C.—Scope

- Chapter IX, I.P.C., deals with two classes of offences, of which one can be committed by public servant alone, and the other comprises offences which relate to public servants, though they are not committed by them. (See Rat. Law of Crimes, 3rd Ed., p. 233). S

(2) Public servants taking gratification other than legal remuneration in respect of official act.

See S. 161, I.P.C. T

(3) Taking gratification in order, by corrupt or illegal means, to influence public servant.

See S. 162, I.P.C. U

(4) Taking gratification for exercise of personal influence with public servant.

See S. 163, I.P.C. Y

(5) Punishment for abetment, by public servant, of offences defined in S. 162 or 163, I.P.C.

See S. 164, I.P.C. W

(6) Public servant obtaining any valuable thing without consideration, from person concerned in any proceeding or business transacted by such public servant.

See S. 165, I.P.C. X

(7) Public servant disobeying law, with intent to cause injury to any person.

See S. 166, I.P.C. Y

(8) Public servant framing incorrect document with intent to cause injury.

See S. 167, I.P.C. Z

(9) Public servant unlawfully engaging in trade.

See S. 168, I.P.C. A

(10) Public servant unlawfully buying or bidding for property.

See S. 169, I.P.C. B

(11) Personating a public servant.

• See S. 170, I.P.C. C

(12) Wearing garb or carrying token used by public servant with fraudulent intent.

• See S. 171, I.P.C. D

13) Railway servants proper.

—as long as they do not cease to be such, continue to be public servants for the purposes of Ch. IX, I.P.C., whatever functions they may be temporarily discharging at the time when the offence by, or in respect of them is committed. 9 P.R. 1868 (Cr.). E

1.—“ For the purpose of chapter IX, Indian Penal Code ”—(Concluded).
(14) Goods clerk.

Under S. 137 of this Act a—employed by a railway Company is a public servant for the purposes of Ch. IX, I.P.C. 9 P.R. 1898 (Cr.). **F**

(15) Abetment.

Where the accused offered Rs. 500 to a Railway goods clerk deputed to assist the police in enquiring into frauds in the Goods Office, it was held that he was guilty of abetment. 9 P.R. 1898 (Cr.) **G**

2.—“ Legal remuneration.”

“ Legal remuneration ”—Definition.

(a) The words “ legal remuneration ” are not restricted to remuneration which a public servant can lawfully demand, but include all remuneration which he is permitted by the Government which he serves to accept. (See S. 161 I.P.C.) **G 1**

(b) The word “ Government ” in the above definition includes an employer of a railway servant. (See section). **G 2**

138. If a railway servant is discharged or suspended from his office, or dies, absconds, or absents himself, and he or his wife or widow, or any of his family or representatives, refuses or neglects, after notice in writing for that purpose, to deliver up to the railway administration, or to a person appointed by

Procedure for summary delivery to railway administration of property detained by a railway servant.

the railway administration in this behalf, any station, dwelling-house, office or other building, with its appurtenances, or any books, papers, or other matters, belonging to the railway administration, and in the possession or custody of such railway servant at the occurrence of any such event as aforesaid, any Magistrate of the first class may, on application made by or on behalf of the railway administration, order any police-officer, with proper assistance, to enter upon the building, and remove any person found therein and take possession thereof, or to take possession of the books, papers or other matters, and to deliver the same to the railway administration or a person appointed by the railway administration in that behalf.

Old Acts.

Act IV of 1879 }
 „ XVIII of 1854 } No corresponding provisions.

(Notes).

General.

(1) Analogous provision.

Cf. S. 106, The Railway Clauses Act, 1845, (8 Vic. c. 20) **G 3**

(2) Object of section.

Much inconvenience to railway administration in India is said to result from there being no means of summarily ejecting from railway buildings a person who has ceased to be entitled to occupy them. (See Statements of Objects and Reasons). **H**

- * **139.** Any notice, determination, direction, requisition, appointment, expression of opinion, approval, or sanction to be given or signified on the part of the Governor-General in Council, for any of the purposes of, or in relation to, this Act, or any of the powers or provisions therein contained, shall be sufficient and binding, if in writing signed by a Secretary, Deputy Secretary, Under-Secretary, or Assistant Secretary, to the Government of India, or by any other officer or servant authorized to act on behalf of the Governor-General in Council in respect of the matters to which the same may relate, and the Governor-General in Council shall not in any case be bound in respect of any of the matters aforesaid unless by some writing signed in manner aforesaid.

Old Acts.

Act IV of 1879. }
 „ XVIII of 1854 } No corresponding provision.

Analogous provision.

Cf. S. 35 of the Railway and Canal Traffic Act, 1888 (51 & 52 Vic. c. 25). I

* **140.** Any notice or other document required or authorized by this Act to be served on a railway administration may be served, in the case of a railway administered by the Government or a Native State, on the Manager, and, in the case of railway administered by a railway company, on the Agent in India of the railway company—

Service of notices
 on railway adminis-
 trations 1.

- (a) by delivering the notice or other document to the Manager or Agent, or
- (b) by leaving it at his office, or
- (c) by forwarding it by post in a prepaid letter addressed to the Manager or Agent at his office, and registered under Part III of the Indian Post Office Act, 1866.

Old Acts.

* Act IV of 1879 }
 „ XVIII of 1854 } No corresponding provision.

(Notes).

General.

(1) Analogous provision

Cf. S. 135, The Companies Clauses Act, 1845 (8 Vic. c. 16); and S. 134, the Lands Clauses Act, 1845 (8 Vic. c. 18). J

General—(Concluded).

(2) Scope of section.

- (a) This section is merely an enabling section. Per *Tyabji, J.* in 26 B. 669. K
- (b) This section does not preclude a claimant from showing that the notice required by S. 77 did in fact reach the Agent within the time limited, though not in one of the modes prescribed in S. 140. 22 M. 137 (dissented in 38 C. 144 = 12 C.W.N. 450). L

(3) Object of section.

- (a) This section was enacted in order to save parties from the inconvenience of being obliged to serve the company itself, by rendering service on the Agent in India equivalent to service on the principal, and further by providing that service on the agent, though not personal, would be sufficient if effected in either of the modes pointed out in cls. (b) and (c) of the section. 22 M. 137 (139). M
- (b) Considerable inconvenience is likely to result from the indiscriminate summoning of the superior officers of the Railway to give evidence on points of railway practice, custom, orders, etc., which should equally well be done by subordinate railway officials at or near the place where the trial is being held. See *Pun. Cir.* p. 142. N
- (c) The subordinate Criminal Courts, should, therefore, in the exercise of their discretion, abstain from requiring the attendance of the Manager and other high officials of the railway, except in special cases in which their evidence is absolutely necessary. (*Ibid*) O
- (d) In the North Western Provinces, in the case of a person in the active service of a Railway, certain persons have been specified as heads of the office. (See *All. Bk. Cir.* pp. 2, 82). P

(Notes).

1.—“Service of notice on Railway administration.”

(1) “May” Scope of the term

- (a) The word “may” in S. 140 of the Act means “must.” 35 C. 194 = 12 C.W.N. 450. (22 M. 137, *Disappr.*) Q
- (b) It means that, if a plaintiff is desirous of serving an effective notice of claim, the notice must be directed to the Manager or Agent as the case may be. (*Ibid.*) R

(2) Service on servant of Government or Railway Company.

See S. 72, Cr. Pro. Code (Act V of 1898). S

(3) Service on Railway Company.

- (a) For purpose of summons, its principal office must be deemed to be the place of its dwelling. 1 Hyde 197. T
- (b) For the mode of service upon a Railway Company, vide *Palmer v. Caledonian Ry. Co.*, (1892) 1 Q. B.; *Clokey v. L. N. W. Ry. Co.* (1905) 2 I. R. 251; *Annual Practice*, (1908) Vol. I, p. 53. U

(4) Notification of a claim for refund.

The—may be given either to the railway administration as defined in S. 3, Sub-S. (6), or in any of the modes mentioned in S. 140. 28 A. 552 (553) = A.W.N. (1906) 101 = 3 A.L.J. 339. (42 M. 137, *F.*). Y

(5) Notice on Traffic Manager.

Service of—is insufficient. 35 C. 194 = 12 C.W.N. 450. • • W

1.—“Service of notice on Railway administration”—(Concluded).

(6) Service of notice of a claim for refund on the General Traffic Manager.

The— of the Company is not a sufficient service within the meaning of S. 140.
28 A. 552 = A.W.N. (1906) 101 = 3 A.L.J. 339 (22 M. 137 ; 24 C. 306 ;
26 B. 669 ; 26 A. 207, F.). X

(7) Service of writ on booking clerk.

— of a Scotch Railway Company at a station on an English line over which
the Scotch Company had running power, has been held insufficient.
Mackareth v. Glasgow and S.W.Ry. Co, L. R. 8 Ex. 149. Y

(8) Suit for value of Articles lost—Notice to railway administration—Service on Traffic Manager.

In a suit to recover value of parcel delivered to defendant Company, plaintiffs
had given notices required by the Act to the Traffic Manager of the
Company within two months after the consignment of the parcel.
Held, that the notice was valid, if it reached the Agent within the time
limited. 22 M 137 (35 C. 194 = 12 C.W.N. 45 Dis.). Z

(9) Principal Office.

The— is the head office for the whole line, and not an office for a traffic station.
Garton v. Gt. W. Ry. Co., 27 L.J. Q.B. 375. A

(10) Statement of fact in a letter—Evidence.

(a) A letter under S. 140 of the Act must be an exact compliance with the
terms of the section it must, therefore, be delivered to the agent at
his office. 9 Bom. L.R. 942. B

(b) The statement of a fact in a letter is not proof of the fact itself. (*Ibid.*) C

141. Any notice or other document required or authorized by
this Act to be served on any person by a railway
administration may be served—
Service of notices
by railway adminis-
trations.

(a) by delivering it to the person, or

(b) by leaving it at the usual or last-known place of abode
of the person, or

(c) by forwarding it by post in a prepaid letter addressed to
the person at his usual or last-known place of abode, and
registered under Part III. of the India Post Office Act,
1866.

• Old Acts.

Act IV of 1879
„ XVIII of 1854 ... No corresponding provision.

(Notes).

Analogous provision.

Cf. S. 136, The Companies Clauses Act 1845 ; and S. 34, The Railways Clauses
Act, 1845 (8 Vic. c. 20). D

I.—“Last known place of abode.”

Last known address or place of abode—Rule 63 of the Rules of 1862.

Defendant resided at *Lohar chali* in Bombay. His brother conducted his business at 36, Fanasvadi, Bombay. To this place the defendant used occasionally to go to attend to his brother's business. *Held*, that the latter was not the defendant's “last known address or place of abode” within R. 63 of the Rules under the English Companies Act, 1862. (25 and 26 Vic. c. 89). 5 Bom. 223. **E**

142. Where a notice or other document is served by post, it shall be deemed to have been served at the time

Presumption.—
where notice is served by post.

when the letter containing it would be delivered in the ordinary course of post, and in proving such service it shall be sufficient to prove that the letter containing the notice or other document was properly addressed and registered. **J**

Old Acts.

Act IV of 1879 ... No corresponding provision.
,, XVIII of 1854 ...

(Note).

Analogue provision

Cf. S. 35, The Regulation of Railways Act, 1873, (36 and 37, Vic. c. 48), and S. 46 (2) of the Income Tax Act, (11 of 1886). **F**

143. (1) A rule under section 22, section 34, or section 84, or the cancellation, rescission, or variation of a rule under any of those sections, or under section 47, sub-section (4) shall not take effect until it has been published in the *Gazette of India*.

Provisions with respect to rules.

(2) Where any rule made under this Act, or the cancellation, rescission, or variation of any such rule, is required by this Act to be published in the *Gazette of India*, it shall, besides being so published, be further notified to persons affected thereby in such manner as the Governor-General in Council, by general or special order, directs.

(3) The Governor-General in Council may cancel or vary any rule made by him under this Act.

Old Acts.

Act IV of 1879 .. S. 8.
,, XVIII of 1854 .. No corresponding provision.

144. (1) The Governor-General in Council may, by notification in the *Gazette of India*, invest, absolutely or subject to conditions, any Local Government with any of the powers or functions of the Governor-General in Council under this Act with respect

Delegation of powers of Governor-General in Council.

to any railway, and may, by that or a like notification, declare what

- Local Government shall, for the purposes of the exercise of powers
- or functions so conferred, be deemed to be the Local Government in respect of the railway.

(2) The provisions of section 139 with respect to proceedings of the Governor-General in Council shall, so far as they can be made applicable, apply to proceedings of a Local Government exercising the powers, or discharging the functions, of the Governor-General in Council in pursuance of a notification under sub-section (1).

Old Acts.

Act IV of 1879 ... S. 53.

• „ XVIII of 1854 ... S. 44.

(Note).

• “Delegation of powers of Governor-General in Council.” •

Notification.

- For—Delegating certain powers and functions vested in the Governor-General in Council to Local Governments, see *General Statutory Rules and Orders*, Vol. III. G

145. (1) The Manager of a railway administered by the Government or a Native State, and the Agent in India of a railway administered by a railway company, may, by instrument in writing, authorize any railway servant or other person to act for or represent him in any proceeding before any Civil, Criminal, or other Court.

Representation of Managers and Agents of Railway in Courts.

(2) A person authorized by a Manager or Agent to conduct prosecutions on behalf of a railway administration shall, notwithstanding anything in section 495 of the Code of Criminal Procedure, 1882, be entitled to conduct such prosecutions without the permission of the Magistrate.

Old Acts.

This section is new.

(Notes)?

General.

Reason for section.

There have been instances of subordinate Courts objecting to the manager of a State railway appearing before them by deputy even where the attendance of the representative of the railway is required for purely formal purposes. There have also been many instances of great and unnecessary expense being imposed on railway administration by reason of subordinate Courts refusing to allow petty prosecutions to be conducted by railway servant. (See *Statement of Objects and Reasons*) H

146. The Governor-General in Council may, by notification in the *Gazette of India*, extend this Act or any portion thereof to any tramway worked by steam or other mechanical power.

Power to extend Act to steam-tramways ¹.

Old Acts.

Act IV of 1879 ... S. 54.
 „ XVIII of 1854 ... No corresponding provision.

I.—“Power to extend to steam tramways.”

Notifications.

- (a) For—extending the Act to certain steam tramways, see *Gazette of India*, 1896, Pt. I, p. 498, and to the Bukhtiarpur—Behar Light Railway, see *Gazette of India*, 1903, Pt. I, p. 727, *ibid*, 1898, Pt. I, p. 467, and *ibid*, 1904, Pt. I, p. 744. I
- (b) For—extending the whole Act except S. 135 to Shahdri (Delhi)—Saharanpur Light Railway see *Gazette of India*, 1907, Pt. I, p. 569. J
- (c) For—extending the whole of the Act except section 135 to the Parlakamedi Steam Railway, see Madras Rules and Orders, Vol. I. K

147. The Governor-General in Council may, by a like notification, exempt any railway from any of the provisions of this Act.

Power to exempt railways from Act ¹.

Old Acts.

This section is new.

I.—“Power to exempt railways from Act.”

Notification.

For—exempting the Barsi Light Railway Company from the provisions of S 85 of the Act, see *Gazette of India* (1893, Pt. I, p. 303). L

148. (1) For the purposes of section 3, clauses (5), (6), and (7), and sections 4 to 19 (both inclusive), 47 to 52 (both inclusive), 59, 79, 83 to 92 (both inclusive), 96, 97, 98, 100, 101, 103, 104, 107, 111, 122, 124 to 132 (both inclusive), 134 to 138 (both inclusive), 140, 141, 144, 145, and 147, the word “railway,” whether it occurs alone or as a prefix to another word, has reference to a railway or portion of a railway under construction, and to a railway or portion of a railway not used for the public carriage of passengers, animals, or goods, as well as to a railway falling within the definition of that word in section 3, clause (4).

Matters supplemental to the definitions of “railway” and “railway servant.”

(2) For the purposes of sections 5, 21, 83, 100, 101, 103, 104, 121, 122, 125, and 137, sub-sections (1), (2), and (4), and section 138, the expression “railway servant” includes a person employed upon a railway in connection with the service thereof by a person fulfilling a contract with the railway administration.

Old Acts.

This section is new.

149. In sections 194, and 192 of the Indian Penal Code, for the words, "by this Code or the law of England," the words, "by the law of British India or England," shall be substituted.

Amendment of
the Indian Penal
Code.

Old Acts.

This section is new.

(Notes).

General.

Reason for section.

This section is suggested by S. 122 of the Railway Bill, 188 (Of S. 149 of present Act) (See Statement of Objects and Reasons.)

150. For that portion of the preamble to the Sindh-Pishin Railway Act, 1887, which begins with the words, "so far as it applies," and ends with the words, "in its entirety," the words, "should apply in its entirety to that part of the Sindh-Pishin section of the North-Western Railway which lies beyond the Province of Sindh," shall be substituted.

Amendment of
the Sindh-Pishin
Railway Act, 1887.

Old Acts.

This section is new.

THE FIRST SCHEDULE.

ENACTMENTS REPEALED.

(See section 2.)

Number and year.	Title.	Extent of repeal.
<i>Acts of the Governor-General in Council</i>		
Act of 1865	.. Carriers Act, 1865 ...	Section 7 (so far as it relates to railways) and section 10.
IV. of 1879	Indian Railway Act, 1879 ...	The whole.
IV. of 1883	... Indian Railway Act, 1883 ...	The whole.
XI. of 1886	... Indian Tramways Act, 1886 ...	Section 49.

Act of the Lieutenant-Governor of Bengal in Council.

II. of 1882	... Bengal Embankment Act, 1882 ..	Section 16, and in section 17 the proviso to the first paragraph of that section, the words, "or under the section last preceding," and the words, "or railroad," wherever they occur.
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1.—“Where the trustee.....sustained” —(Continued).

(ii) SUITS NOT FALLING UNDER S. 10.

(a) A transaction, whereby certain shares in a Company are allotted to a third person on the understanding that the latter was to transfer the shares to the plaintiffs on their paying him a certain sum of money, does not constitute a trust in favour of the plaintiffs for any specific purpose, within the meaning of S. 10 of the Limitation Act, of which the plaintiffs can enforce specific performance. 2 C. 323 (326). J

(b) The section excludes implied trusts, or such trusts as the law would enforce merely from the existence of particular facts, or fiduciary relations. 4 C. 455 (465) = 3 C.L.R. 315. K

(c) *Per White, J.*—These words are used in a restrictive sense and limit the character and nature of the trust attaching to the property sought to be followed. The phrase is a compendious form of expression for trusts of the nature and character mentioned in Arts. 133 and 134 of the Limitation Act. 4 C. 897 = 4 C.L.R. 193. L

(d) *Per Garth, J.*—They are intended to apply to trusts created for some assumed or particular purpose or object, as distinguished from trusts of a general nature, such as the law imposes on executors and others, who hold recognised fiduciary positions. 4 C. 897 = 4 C.L.R. 193; (4 C. 455, F, 2 B. 388, D). M

(e) is the object of a suit by a *cestui que trust* is not to recover any property in specie, but to have an account of the defendant's stewardship, which means an account of the moneys received and disbursed by him on the plaintiff's behalf, and to be paid any balance which may be found due to him on taking the account, the benefit of the exemption under S. 10 of the Limitation Act (XV of 1877) cannot be claimed, and the suit must be brought within six years (under Art. 120) from the date when the right to sue first accrued to the plaintiff. To claim the benefit of S. 10 of the Limitation Act, the suit against the trustee must be for the purpose of following the trust property in his hands. 5 C. 910 = 6 C.L.R. 195, followed in 8 C. 788 (807), distinguished in 32 C. 719 (727) = 1 C.L.J. 232; referred to in 18 C. 551 (556). N

(f) Suit against the Secretary of State for India, for the residue of the sale proceeds of an estate, sold under Act XI of 1859 (Bengal) *Held*, the suit was governed by Art. 120 and S. 10 of the Act did not apply. 20 C. 51 (F.B.), referring to 4 C. 455 = 3 C.L.R. 315. O

(g) Where, primarily, a suit is not one to follow trust property in the hands of the representative of a trustee, but really one for an account against the executor or representative, S. 10, Limitation Act, would not apply to such a suit. It would be governed by Art. 120, 10 B. 240 (247), following 5 C. 910 = 6 C.L.R. 195. P

(h) Although executors may be trustees, and although property may become vested in them, under the will, for some specific purpose, yet, if there was no trust declared and no direction given to distribute the residue among the heirs-at-law, such executors could not be held to be express trustees for a specific purpose, so as to apply to them, S. 10 of the Limitation Act. 14 B. 476 (481). Q

1.—“Where the trustee.....sustained ”—(Concluded).

(ii) SUITS NOT FALLING UNDER S. 10—(Concluded).

- (i) The words “*vested in trust for a specific purpose*” apply only to express trusts. They do not apply to trustees under a will, who are not express trustees for the heirs of the testator, except in so far as the terms of the will constituted them such trustees. 21 B. 646 (665), following 4 C. 455 = 3 C.L.R. 315. R

(40) Reason why limitation is no bar to suit against express trustee.

- Limitation does not run to extinguish a suit against a trustee, in the case of express trusts, for, owing to the privity obtaining between them, the possession of the trustee is the possession of the beneficiary and no adverse claims could arise. *Chadmer v. Bradley*, 1 J. and W. 67; *Bennett v. Colley*, 2 M. and K. 232. S

(41) Constructive trusts will be barred.

Limitation will however operate to extinguish constructive trusts, if nothing is made to keep them alive *Petre v. P.*, 1 Drew 371, *Re Scott*, 8 Ir. Ch. Rep. 316. T

2.—“Unless the beneficiary ...concurred in the breach.”

A.—UNLESS THE BENEFICIARY HAS BY FRAUD INDUCED THE TRUSTEE TO COMMIT THE BREACH.

No relief to infant or *feme covert* fraudulently inducing trustee to commit breach.

- (a) Infancy being no passport to commit a fraud on others, Courts will not protect an infant old and cunning enough to commit a fraud. *Evroy v. Nicholas*, 2 Eq. Ca. Ab. 489 *Per Lord King, Earl of Buckingham v. Drury*, 2 Ed. 71, 72, *Woolf v. W.*, (1899) 1 Ch 343. U
- (b) Therefore, an infant beneficiary fraudulently holding himself out to be a major and thereby inducing the trustee to pay him cannot render the trustee liable to pay him over again, when he really attains majority. *Overton v. Banister*, 3 Hare 503. *Wright v. Snowe*, 3 De. G. and Sm. 321; *Nelson v. Stocker*, 4 De. G and J. 458. Y
- (c) Since a person will not be exempted from liability to a charge of fraud either on account of coverture or infancy, a *feme covert* or infant, leading a trustee into committing a breach of trust, is precluded from claiming relief against him for the breach. *Re Lush's Trusts*, 4 L.R. Ch. Ap. 591, *Davies v. Hodgson*, 25 Beav. 187; *Beckett v. Cordley*, 1 B.C.C. 358, *Ryder v. Pickerton*, cited in *Walker v. Symonds*, 3 Sw. 82, and *Cory v. Gertchen*, 2 Madd. 40. W

B.—OR THE BENEFICIARY... CONCURRED IN THE BREACH.

(1) Concurrence of beneficiaries will condone breach.

- (a) The rule of the Court, in all cases, is that, if a trustee errs in the management of the trust and is guilty of a breach of trust, yet, if he goes out of the trust with the approbation of the beneficiary, it must first be made good out of the estate of the person who consented to it. *Traford v. Boehm*, 3 Atk. 414; *Per Lord Hardwicke*. X

3.—“Or subsequently.....trustee”—(Continued).

- (b) But there are cases where a knowledge of the facts may and even ought to be inferred from great lapse of time. *Life Association of Scotland v. Siddal*, 3 DeG.F. and J. 77. J
- (c) And mere knowledge and forbearance from suing on the part of the *cestui que trust* were held not to operate as a bar against him, where the abstinence was only for (i) three years, *Hanchett v. Briscoe*, 22 Beav. 496, (ii) four years, *Re Jackson*, 44 L.T.N.S. 467, (iii) ten years, *Farrant v. Blanchford*, 11 W.R. 178 and even (iv) twelve years, *Rochevoucauld v. Boustead*, 1 Ch. (C.A.) 196. K

(22) Essentials of valid acquiescence, etc.

- (a) The *cestui que trust* must be a *sui juris* a female under coverture is a *sui juris* in respect of her property settled to her separate use, or her separate property under the Married Women's Property Act, where there is no restraint against anticipation; *Taylor v. Cartwright*, 14 L.R. Eq. 175. L
- (b) Infants attaining majority should have proper legal advice, if they require it, before executing a formal release. *Lloyd v. Atwood*, 3 De. G. and J. 615, and the Court will watch over the infant, even though he may be twenty-one years of age, till he is properly informed as to his estate. *Kilbee v. Sneyed*, 2 Moll. 233. M
- (c) The beneficiary must have full knowledge of his rights and of the facts of the case (*Strange v. Fooks*, 1 Clff. 408 and *Adams v. Clifton*, 1 Russ. 297) Else, the release may be set aside even after a long period, as twenty years. *Re Garnett*, 31 Ch. D. (C.A.), 1. N
- (d) There must be the knowledge of the breach of trust, and the knowledge must be positive. It is not enough to say that the beneficiary cannot be put upon inquiry, since he is not bound to do anything in self-protection. It is the duty of his trustee to protect him. *Birrell*, 113. O
- (e) Whether it be acquiescence in the conduct or in the language of others, it must be clearly shown that such conduct was fully known or understood by the person, before any inferences can be made from his passiveness or silence. *Smith v. Hayes*, Ir. R. 1 C.L. 333. P
- (f) And the knowledge must be complete, for the beneficiary cannot be bound by acquiescence, unless he has been fully informed of his rights, and of the material facts and circumstances of the case. *Birrell*, 113. Q
- (g) But knowledge by itself is not acquiescence, you may know without assenting, and, if you do not assent, you do not acquiesce. (*Ibid.*) R
- (h) The beneficiary must also understand what is the law on the point and what actions the Courts will take upon it. *M'Carthy v. Decaix*, 2 R. and M. 615; and *Marker v. Marker*, 9 Hare 16; *Cockerell v. Cholmeley*, 1 R. and M. 425. S
- (i) If bare acquiescence is a valid defence, it must be an acquiescence while the act acquiesced in is in progress, and not after it has been completed. *De Bussche v. Alt.*, L.R. Ch. D. 286. See 12 M. 322. T

3.—“Or subsequently.....trustee”——(Concluded).

- (j) Where a party is fixed with acquiescence, the circumstances must be not only such as afforded him an opportunity to act or to speak, but such also as would properly and naturally call for some action or reply from men similarly situated. *R. v. Mitchell*, 17 Cox. C.C. 503. **U**
- (k) A release extorted from a beneficiary by distress or terror is invalid. *Bowles v. Stewart*, 1 Sch. and Lef. 209 (226). **Y**

4.—“A trustee....interest except.....cases.”

A.—Ordinary interest.

(1) When trustee presumed to have received interest.

- A trustee may fairly be presumed to have received interest, where he has traded with the trust money *Penny v. Arison*, 3 Jur. N.S. 62.
- (See clause (d) of section) **W**

(2) When trustee need not pay interest.

- (a) A trustee, by whose default in not calling in and investing the trust property it is lost, will have to make good the loss, but need not pay interest. *Lawson v. Copeland*, 2 B.C.C. 156 **X**
- (b) Where a trustee or executor *bona fide* pays over trust money to the wrong person, he will be liable to refund, but not to pay interest *Saltmarsh v. Barrett*, 31 Beav. 349. **Y**
- (c) It is not the practice of the Court to award interest on what may be found due for arrears of income. *Ploag v. Johnson* 2 L.R. Ch. App. 225. **Z**

(3) Honest breaches of trust—Interest awarded—Liability based on actual amount of loss.

- (a) For loss of capital caused by disobeying the directions of a settlement, where the trustees are given a choice of investments, the beneficiaries can only claim the money with interest at 3 per cent. *Re Barclay, Barclay v. Andrew*, 1 Ch. 674 and *Robinson v. R*, 1 D. M. & G. 247. **A**
- (b) A neglect to invest the rents and profits of an estate in a receiver's hands will render him liable to pay interest on the sums he has received. *Hicks v. Hicks*, 3 Atk. 274 **B**
- (c) Where a trustee unreasonably delays to invest trust money, he should, during the continuance of such delay, account to the beneficiaries for simple interest at 3 per cent, because, if he had not delayed, the interest would have accrued. *Re Goodenough, Marland v. Williams*, (1895), 2 Ch. 537 and *Stafford v. Fiddon*, 23 Beav. 386. **C**
- (d) And it will be decreed, even when there may be no prayer in the bill for it. *Woodhead v. Marriott*, C.P. Coop. Cases, 1837—38, 62 **D**
- (e) Where the interest has been paid by mistake, such wrong payment, though irrecoverable, will not affect the right to the principal. *Remnant v. Hood*, 2 DeG. F. and J. 404. *Ex parte O'je*, L.R. 8 Ch. 711. **E**
- (f) A resale of the trust property by the trustee will render him accountable for any profit with interest. *Ex parte Reynolds*, 5 Ves. 707. **F**

4.—“A trustee... interest except... cases”—(Continued).

A.—Ordinary interest—(Concluded).

- (g) A *cestus que trust* may claim from a trustee, who has purchased the estate and sells it to a purchaser for value without notice, either the difference between the price which the trustee gave and that for which he sold, or the real value of the estate at the time of sale with interest. *For v. Mackreth*, 2 Cox. 320; *Hall v. Hallet*, 1 Cox. 139 and *Lord Hardwicke v. Vernon*, 4 Ves. 416. **G**
- (h) Where, after paying debts and legacies, an executor or administrator retains the testator's assets without accounting to the residuary legatees or next of kin, he will, after the year generally allowed to realise his testator's assets, be liable to pay interest on the amount retained. *Ratchffe v. Graves*, 1 Vern. 196, *Forbes v. Ross*, and *Holgate v. Haworth*, 17 Beav. 259. **H**
- (i) Where the executors, bound to make the funds productive, do not apply the assets in paying a debt carrying interest due from the testator's estate, they will be liable to pay the amount of the interest. *Hall v. Hallet*, 1 Cox. 134; *Turner v. T.*, 1 J. and W. 43. **I**
- (j) Where a trustee mixes trust moneys with his own and employs the mixed funds in trade, the beneficiary may claim the principal and proportionate profits, rather than the principal and interest only, but cannot claim both interest and profits, but must choose between them. *Vyse v. Foster*, L.R. 8 Ch 334 **J**
- (k) Where the grandfather of the plaintiff bequeathed a sum of money in the hands of the defendant, to be paid by him to the plaintiff without interest, and the defendant traded with the money and made certain profits, in a suit to recover the sum mentioned above with compound interest, but not based on the will, nor on any trust alleged, the defendant resisted the claim for interest, on the ground that no interest was payable under the will. *Held*, that the plaintiff was entitled to recover interest under the circumstances. 2 A.W.N. 169. **K**
- (l) Where, independently of any breach of trust, loss would always ensue on the realization of trust property, and the latter is still more depreciated by a breach of trust, the trustee is liable only for the further depreciation, and not for the difference between the nominal and the actual value realized. *Lord Gainsborough v. Watcombe Terra Cotta Co.*, 54 L. J. Ch. 991. **L**
- (m) The fact that the executor did not profit by the money with him is no excuse, as it is his duty to make it profitable to the estate, and he will have to pay interest, notwithstanding that he may have left the money with his banker on a separate account. *Ashburnhan v. Thompson*, 13 Ves. 402. **M**

B.—Compound interest.

(1) Express trust necessary for charging compound interest.

- (a) An express trust must have been declared, to charge the trustee with compound interest. *Tebbs v. Carpenter*, 1 Madd. 290; *Attorney-General v. Solly*, 2 Sim. 518. **N**

4.—“A trustee....interest except....cases”—(Continued).

B.—Compound interest—(Continued).

(b) “Where there is an express trust to make improvement of the money, if the trustee will not honestly endeavour to improve it, there is nothing wrong in considering him, as the principal, to have lent the money to himself upon the same terms upon which he could have lent it to others, and as often as he could have lent it if it be principal, and as often as he ought to have received it and lent it to others, if the demand be interest, and interest upon interest.” *Raphael v. Boehm*, 11 Ves. 92 (107). O

(2) Active calling in of trust moneys for embarking them in trade necessary for charging compound interest.

• To charge a trustee with compound interest, or with the actual profits of employing the trust funds in trade, there must be an active calling in of the trust moneys for the purpose of embarking them in the trade or speculation, a mere neglect to call in moneys, already embarked by the solicitor in the trustee's trade, is not enough. *Vyse v. Foster*, 8 Ch. App. 309. P

(3) Honest breach of trust, but compound interest awarded.

(a) An executrix, who let the trust funds lie idle for nine years with her solicitors, during the *cestui que trust's* infancy, was made to pay compound interest at 3 per cent. per annum, with half yearly rests, it being her duty to have accumulated the income by investment. *Giboy v. Stephens*, 30 W. R. 755. Q

(b) A trustee will, when directed to accumulate, be charged compound interest with yearly or half yearly rests. *Re Barclay Barclay, v. Andren*, (1901) 1 Ch. 674, *Re Emmet, Emmet v. E.*, 17 C. D. 142, *A.—G. v. Alford*, 4 D. M. and G. 851. R

(4) Dishonest breach—Compound interest.

• In such a case, the Court would be justified in dealing, in point of interest, very hardly with an executor, because it might fairly infer that he used the money in speculation, by which he either did make 5 per cent. or ought to be estopped from saying that he did not. The Court would not inquire what had been the actual proceeds, but, in application of the principle “*in odium spoliatoris omnia presumuntur*,” would assume that he did make the higher rate, that is, if there were a reasonable presumption. *A.—G. v. Alford*, 4 D. M. and G. 851. S

(5) Grounds on which compound interest charged.

• (a) Where a solicitor-trustee used trust funds in his business, interest was ordered to be charged at the rate of 5 per cent. for this reason that the money was retained in the defendant's own hands, and was made use of by him. But the Court is wrong in directing half-yearly rests; because the principle laid down in the case of *Attorney-General v. Alford* appears to be the sound principle, namely, that the Court does not proceed against an accounting party by way of punishing him for making use of the plaintiff's money, by directing rests, or payment of compound interest, but proceeds upon this principle that either he has made, or has put himself into such a position that he is presumed to have made, 5 per cent. or compound interest, as the case may be. *Burdock v. Garrick*, 5 Ch. App. 238. T

4.—“A trustee....interest except...cases”—(Continued).

B.—Compound interest—(Concluded).

- (b) Where a trustee employs money in ordinary trade, he will be made liable for compound interest, because trade capital is presumed to yield it; but that reason has no application to capital employed in a solicitor's business, upon which a solicitor is frequently receiving no interest at all. (*Ibid*) U
- (c) See, also, *Vyse v. Foster*, 7 L.R.H.L. 318, where James, L.J. approving *Penny v. Arison*, *infra*, remarked that the Court was not a Court of penal jurisdiction. Y

(6) Cases where compound interest will be charged.

- (a) Where the trustee ought to have received more, as by improperly calling in a mortgage carrying 5 per cent.
- (b) where he had actually received more than 4 per cent.
- (c) where he must be presumed to have received more, as if he had traded with the money. *Penny v. Arison*, 3 Jur. N.S. 62 W
- (d) Cases are rare where 5 per cent compound interest will now be charged, save in cases of trustee trading with trust money. *Re Davis, D. v. D.*, (1902) 2 Ch. 315; *Raphael v. Boehm*, 11 Ves. 111; 13 Ves. 407, 590; *Coutts v. Roberts*, 6 C. and F. 65, *Knot v. Cotte*, 16 Beav. 80; *Townend v. Townend*, 1 Giff. 201, *Re Emmet, E. v. F.*, 17 C.D. 142. X

C.—Employment of trust property in trade, etc.—Interest.

Partner trustee employing trust funds in trade.

- (a) Where a trustee, who is a partner in a firm pays trust moneys into the partnership account, any loss caused by the breach will render the other partners liable. *Eager v. Barnes*, 31 Beav. 579; *Blair v. Bromley*, 5 Ha. 542. Y
- (b) The partners of a firm of solicitors, one of whom commits a fraud against the *cestui que trust*, will become liable for the breach. *Sawyer v. Goodwin*, 36 L.J.N.S. Ch. 578 Z

D.—Further safeguard against breaches of trust.

Maxims established by Chancery Courts to maintain trusts against trustee's wrongful acts.

- I. “What ought to be done shall be considered as done.” *Fitzgerald v. Jerlouse*, 5 Mad. 29, *Poore v. Blount*, Cowp. 467; *Pulleney v. Darlington*, 1 B.C.C. 237, *Astley v. Earl of Esser*, 6 L.R. Ch. App. 898. A

- (a) “The forbearance of the trustees in not doing what it was their office to have done shall in no sort prejudice the *cestui que trust*, since at that rate it would be in the power of trustees, either by doing or del.ing to do their duty, to affect the right of other persons; which can never be maintained. Wherefore the rule in such cases is, that “*What ought to have been done shall be taken as done*,” and a rule so powerful it is, as to alter the very nature of things, to make money land, and, on the contrary, to turn land into money.” *Lechmere v. Earl of Carlisle*, 3 P.W. 215. B

4.—“A trustee....interest....except....cases ”—(Concluded).

D.—Further safeguard against breaches of trust—(Concluded).

- (b) If the purchase had been made, it must have gone to the heir, but if the trustee, by delaying the purchase, might alter the right, and give it to the executors, this would be to *make it the will of the trustee, and not the will of the testator, which would be very unreasonable and inconvenient.* *Scudamore v. Scudamore*, Pr. Ch. 543. **C**
- (c) Hence, it is a rule of equity that money in whatever manner desired to be invested in the purchase of land, or land similarly required to be converted by sale into money, shall be treated as that kind of property into which it is to be desired to be converted. *Fletcher v. Ashburner*, 1 B.C.C. 499, *Wheldale v. Partridge*, 5 Ves. 396; *Stead v. Newdigate*, 2 Mer. 521 and *Ashby v. Palmer*, 1 Mer. 296. **D**
- (d) But this doctrine of conceptual conversion will hold good only till some beneficiary, competent to elect, announces his intention to take the property as it originally was. *Cookson v. Reay*, 5 Beav. 22; *Harcourt v. Seymour*, 2 Sim. N.S. 45. **E**
- (e) The reason for this limitation is that a Court of Equity will not force a conversion on an unwilling absolute owner, as he might immediately reconvert it, rendering the Court's action vain, a result which it dislikes. *Seel v. Jago*, 1 P.W. 389. **F**
- II. (a) “The act of the trustee shall not alter the nature of the beneficiary's estate.” *Selby v. Alston*, 3 Ves. 341; *Philips v. Brydges*, 3 Ves. 127 and *Eaton v. Saunders*, Amb. 242. **G**
- (b) Though the trustee may legally be the absolute owner of the land or money, he is considered only as a means to the carrying out of the trust in Equity, which will never allow the beneficiaries' interest to be affected by any misfeasance, but, as often as any unauthorized conversion is made, will transfer to the new interest the attributes of the old, that is, treat real property as personal and *vice versa*, as circumstances may require. *Re Hamilton*, 2 Ch. (C.A.), 617. **H**

24. A trustee, who is liable for a loss occasioned by a breach of trust in respect of one portion of the trust-property, cannot set off against his liability a gain which has accrued to another portion of the trust-property through another and distinct breach of trust.

No set-off allowed to trustee 1.

(Notes).

1.—“No set off allowed to trustee.”

(1) Section explained.

- (a) See Tagore Law Lectures, 1881, 193, also *Dimes v. Scott*, 4 Russ. 195 which is to the same effect as this section. **I**
- (b) “When there are two separate funds, subject to trusts, and the trustees commit a breach of trust as to one, by which it is lost, it is impossible to permit the trustees to say ‘we have improved the other fund, and that fund is bound to make up the loss on the other.’ If the trustees have lost one part of the settled funds, they must answer for it, whatever may be the improvement of the other part.” *Dimes v. Scott*, 4 Russ. 195. **J**

1.—“No set off allowed to trustee” —(Concluded).

(c) Where there are several distinct investments by trustees which are not authorised by the instrument of trust, in some of which a loss has been incurred for which the trustees can be made chargeable, and in some others there has been a gain, which the trustees have no right to claim for their own benefit, the Court will not set off the loss in one against the gain in the other. *Wiles v. Gresham*, 2 Drew. 258. **J**

(d) Where executors were directed to convert the testator's property and invest it in Government or real securities, and they allowed the tenant for life for 11 years to receive 10 per cent. on an Indian loan, and then invested the capital in the purchase of Bank Annuities, and the stock purchased was considerably more than could have been purchased with the same capital at the end of one year from the testator's death, they were not only made liable for the excess of interest paid to the tenant for life, but were disallowed their claim to set off against their liability the accidental advantage accruing to the trust from their laches in making the investment, and the depreciation of funds during the interim. *Dimes v. Scott*, 4 Russ. 195. **K**

(e) Where the breach of trust causes benefit to the testate, the trustee is not liable for outlay. See *Vyse v. Foster*, 8 Ch. Ap. 309. **L**

(f) Loss on one transaction cannot be set off against gain on another. *Wiles v. Gresham*, 2 Drew. 258. **M**

(2) Where the loss and gain arise out of the same transaction.

(a) —, the trustees would be allowed a set off. *Mletcher v. Green*, 33 Beav. 426. **N**

(b) Where a trustee commits a breach of trust in lending trust moneys on mortgage, and upon a suit by him the mortgaged property is sold, and the money is paid into Court, and is invested in consols pending the suit, and the consols rise in value, the trustee would be allowed to set off the gain in the value, of the consols, against the loss under the mortgage. (*Ibid.*) **O**

3) Where loss and gain arise from two distinct transactions

But—no set off would be allowed. *Dimes v. Scott*, 4 Russ. 195. (see *supra*). **P**

25. Where a trustee succeeds another he is not, as such, liable for the acts or defaults of his predecessors.

Non-liability for predecessor's default ¹.

(Notes).

1.—“Non-liability for predecessor's default.”

(1) Liability for breach of trust by predecessor or co-trustees.

The leading case upon this point is *Towrley v. Sherborne*, Bridgman 35; Tagore Law Lectures, 1881, 193. **Q**

(2) Inquiries as to acts of predecessors.

(a) Trustees should ascertain “that the trust fund is properly invested, and that their predecessors have not committed breaches of trust which ought to be set right.” Underhill, p. 166.

1.—“Non-liability for predecessor’s default”—(Concluded).

(b) Where, owing to a trustee not inquiring into such matters, the trust estate should suffer, a new trustee may be liable; “although he himself took no part, and could have taken no part, in committing the original breaches of trust.” *Harvey v. Oliver*, 57 L.T. 289. **S**

(c) But where the old trustees had claims against third parties (e.g., against their solicitor for negligence), the new trustees cannot sue the third parties, but must apply to the Court for directions. *Plaskitt v. Eddis*, 79 L.T. 136. **T**

26. Subject to the provisions of sections 13 and 15, one trustee is not, as such, liable for a breach of trust committed by his co-trustee:

Provided that, in the absence of an express declaration to the contrary in the instrument of trust, a trustee is so liable—

(a) where he has delivered trust-property to his co-trustee without seeing to its proper application.

(b) where he allows his co-trustee to receive trust-property, and fails to make due enquiry as to the co-trustee’s dealings therewith, or allows him to retain it longer than the circumstances of the case reasonably require ².

(c) where he becomes aware of a breach of trust committed or intended by his co-trustee, and either actively conceals it, or does not, within a reasonable time, take proper steps to protect the beneficiary’s interest ³.

A co-trustee, who joins in signing a receipt for trust property, and proves that he has not received the same, is not answerable, by reason of such signature only, for loss or misapplication of the property by his co-trustee.

Joining in receipt
for conformity.

Illustration.

A bequeaths certain property to B and C, and directs them to sell it and invest the proceeds for the benefit of D. B and C accordingly sell the property, and the purchase money is received by B and retained in his hands. C pays no attention to the matter for two years and then calls on B to make the investment. B is unable to do so, becomes insolvent, and the purchase-money is lost. C may be compelled to make good the amount.

• **(Notes).****1.—“Non-liability for co-trustee’s default.”****(1) Section explained.**

A trustee enabling a co-trustee to deal alone with the fund, for the supposed purpose of an intended investment, was held liable for its loss. *Hanbury v. Kirkland*, 3 Sim. 265, cited in 7 Bom.L.R. 691 (695). **U**

1.—“Non-liability for co-trustee's default”—(Continued).

(2) Reason of the rule in the section.

- (a) The general rule is that trustees and executors are not chargeable with other's defaults. *Barnard v. Bagshaw*, 3 D.J. and S. 355, cited in 7 Bom. L. R. 691 (695). Y
- (b) But the benefit of this rule is denied to a trustee or executor who has been guilty of negligence. 7 Bom. L.R. 691 (695). W
- (c) Unless a breach of trust can be alleged and proved against a trustee, he cannot be made liable, simply because a co-trustee of his has committed default. *Toun v. Sherborne*, Birroll, 109. X

3) Protection against the Acts of co-trustees—English law.

- (a) “A trustee is not answerable for the receipts, acts, or defaults of his co-trustee, save only— (a) Where he hands the trust property to him without seeing to its proper application, (b) Where he allows him to receive the trust property without making due inquiry as to his dealing with it, (c) Where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to obtain restitution and redress or to prevent the meditated wrong.” *Dawson v. Clarke*, 18 Ves. 247, *Wynne v. Tempest*, 13 T. L. R. 360; *Mullar's Trustees v. Polson*, 34 Sc. L. R. 798; Underhill, 6th Ed., Art. 78, p. 397. Y
- (b) The leading cases on the subject in English law are *Wilkins v. Hogg*, 3 Giff. 116 and *Tounley v. Sherborne*, Bridg 35. Z
- (c) In *Wilkins v. Hogg*, “the testatrix, after appointing three trustees, declared that each of them should be answerable only for the losses arising from his own default, and not for involuntary acts or for the acts or defaults of his co-trustees; and particularly, that any trustee, who should pay over to his co-trustees, or should do or concur in any act enabling his co-trustees to receive any moneys for the general purposes of her will, should not be obliged to see to the due application thereof, nor should such trustee be subsequently rendered liable by any express notice or intimation of the actual misapplication of the same moneys. The three trustees joined in signing and giving receipts to insurance companies, for sums of money paid by them, but two of the trustees permitted their co-trustee to obtain the money without ascertaining whether he had invested it. This trustee having misapplied it, it was sought to make his co-trustees responsible.” Held they were not. A
- (d) In the above case the following observations were made by Lord Westbury —
 “There are three modes in which a trustee would become liable according to the ordinary rules of law—first, where, being the recipient, he hands over the money, without securing its due application; secondly, where he allows a co-trustee to receive money, without making due inquiry as to his dealing with it; and thirdly, where he becomes aware of a breach of trust, either committed or meditated, and abstains from taking the needful steps to obtain restitution or redress. . . There remained, therefore, only personal misconduct, in respect of which a trustee acting under this will would be responsible. He would still be answerable for collusion if he handed over

1.—“Non-liability for co-trustee's default ”—(Continued).

trust money to his co-trustee with reasonable ground for believing or suspecting that that trustee would commit a breach of trust. (*Ibid.*) **B**

- (e) For a more recent case on the same point; see *Pass v. Dundas*, 29 W.R. 332. **C**

(4) Negligence of trustee.

- (a) But negligence is breach of trust, and if it is by the negligence of one trustee that another has been able to commit a fraud, the negligent trustee is liable, not for the fraud of which he is wholly innocent, but for his negligence which permitted it. *Trutch v. Lamprell*, 20 Beav. 116. **D**

- (b) Where, two trustees having properly sold out trust money, one of them handed the cheque for the proceeds to the other, who speedily applied it for purposes of his own, *held*, that both trustees were liable. (*Ibid.*) **E**

- (c) In the above case, as the one who had misappropriated the money had disappeared, the effect was that the honest, but careless trustee, had to replace the whole fund. (*Ibid.*) **F**

- (d) “This is one of those painful cases, which unfortunately this Court has constantly to deal with, where trustees, innocent of any desire to benefit themselves, have failed to perform their duties, and the Court is compelled to make them responsible. It is constantly argued by counsel, but the conclusion is as constantly rejected by the Court, that a person who acts is not an active trustee and is not liable, because he has only acted for conformity's sake. It is a contradiction in terms to say that a trustee who acts is not an active trustee by taking upon himself the office of trustee and acting. He becomes, in that transaction at least, an active trustee, and is bound properly to perform all the duties appertaining to his office. It is impossible for the negligent trustee to contend with success that he was justified in paying over the cheque to his co-trustee.” (*Ibid.*) See, also *Robinson v. Harkin*, 1896, 2 Chy. 415. **G**

- (e) Where a trustee is made liable for his negligence, there is no obligation upon the trustee who is a defaulter to indemnify his innocent but negligent brother. See *Bahin v. Hughes*, 31 Ch. Div. p. 390. **H**

(5) Fraud of trustee.

Where there is an evil practice, fraud, or ill-intent in the trustee that permitted his companion to receive the whole profits, he may be charged though he receive nothing.” Tagore Law Lectures, 1881, 193; *Williams v. Dixon*, 2 Beav. 472. **I**

(6) Trustee must not put the trust-fund out of his control.

- (a) A— and under the control of other persons. Tagore Law Lectures, 1881, 141. **J**

- (b) If he so puts it under the control of other persons, he guarantees the solvency of those persons, and will be answerable for any loss that may ensue. *Salway v. Salway*, 2 R. and M. 218. **K**

- (c) And it makes no difference as regards the liability of the trustee, although the persons under whom the property was left were co-trustees. *Lewis v. Noble*, L.R. 8 Ch. D. 591. **L**

1. —“*Non-liability for co-trustee's default*”—(Concluded).

(7) **Trustee to prevent even threatened breach of it.**

- (a) A trustee is called upon, even if a breach of trust is only threatened, to prevent it by obtaining an injunction. *In re Chertsey Market*, 6 Price, 279, cited in 7 Bom. L. R. 691 (695) **M**
- (b) The law requires of trustees an active and vigilant prudence, and the omission to take the legal steps is blameworthy. (*Ibid*) **N**

(8) **Liability of Hindu Trustee—Law before the Act.**

A Hindu trustee, who, having accepted a trust, remains passive and takes no steps to see the trust carried into execution, is liable for losses arising from the breach of trust of his co-trustee. See 9 B.H.C. 333. **O**

2.—*Clause (b).*

Clause (b) explained.

Cl. (b) of this section provides that, in the absence of an express declaration to the contrary in the instrument of trust, a trustee is liable for a breach of trust committed by his co-trustee, where he allows his co-trustee to receive trust-property, and fails to make due inquiry as to the co-trustee's dealings therewith, or allows him to retain it longer than the circumstances of the case reasonably require. 7 Bom. L.R. 691 (695). **P**

3.—*Clause (c).*

Clause (c) explained.

Under Cl. (c) of the section, a similar liability is imposed, where the trustee becomes aware of a breach of trust committed or intended by his co-trustee, and does not within a reasonable time take proper steps to protect the beneficiary's interest. 7 Bom. L.R. 691 (695). **Q**

A trustee will be personally responsible (i) if he, being cognisant of a breach of trust committed by another trustee, industriously conceals it. *Boardman v. Mossman*, 1 B.C.C. 68 or **R**

- (ii) if, being so cognisant, he does not take any active measures to protect the interests of his *cestui que trust*. *Bruce v. Stokes*, 11 Ves. 319. **S**

4.—“*Joining in receipt for conformity.*”

(1) **Rule as to trustee joining in receipt for conformity.**

Where a trustee joins in a receipt for conformity, but without receiving the money, he shall not be answerable for a misapplication by the trustee who receives. *In re Fryer*, 3 K. and J. 317. **T**

(2) **Reason for the above rule.**

“If the administration of trust is vested in co-trustees, a receipt for money paid to the account of the trust must be authenticated by the signature of all the trustees in their joint capacity, and it would be tyranny to punish a trustee for an act which the very nature of his office will not permit him to decline.” Lewin, 11th Ed., p. 291. **U**

4.—“Joining in receipt for conformity”—(Concluded)

(3) Application of the rule.

- (a) The trustee who claims non-liability must prove that he did not actually receive the money. *Brice v. Stokes*, 11 Ves. 234. **Y**
- (b) The burden of proof is upon the trustee claiming non-liability to show that the money acknowledged to have been received by all was in fact received by the other or others, and that he himself joined only for conformity. (*Ibid*) **W**
- (c) In the absence of all evidence, the effect of a joint receipt is to charge each of the trustees *in solido*. *Brice v. Stokes*, 11 Ves. 319; *Lewin*, p. 265, *Whit. Stokes*, Vol. 1, 851. **X**
- (d) Although a joint receipt at law is conclusive evidence that the money came into the hands of all, yet a Court of Equity will decree according to the justice of the case. *Harden v. Parsons*, 1 Eden. 147. **Y**
- (e) The rule as to non-liability of trustee for merely joining *pro forma* in receipt, is inapplicable, where, from the nature of the transaction or character of the trust, the omission to receive the money is in itself a breach of duty. *Per Kay, J., in Re Folowel and the Metropolitan Board of Works*, 27 Ch D. 592. **Z**

(4) Trustee joining in a receipt must not permit money to be with co-trustee.

- (a) Although a trustee joining in a receipt may be safe in merely permitting his co-trustee to receive in the first instance, yet he must be careful not to allow the money to remain in his hands for a longer period than the circumstances of the case reasonably require. *Brice v. Stokes*, 11 Ves. 319. **A**
- (b) It is the duty of the trustee not to rely on a mere statement by his co-trustee, that the money has been duly invested, but to ascertain that such is the fact. *Thompson v. Finch*, 22 Beav. 316 **B**

27. Where co-trustees jointly commit a breach of trust, or where one of them by his neglect enables the other to commit a breach of trust, each is liable to the beneficiary for the whole of the loss occasioned by such breach.

Several liability of co-trustees 1

But, as between the trustees themselves, if one be less guilty than another, and has had to refund the loss, the former may compel the latter, or his legal representative, to the extent of the assets he had received, to make good such loss; and, if all be equally guilty, any one or more of the trustees who has had to refund the loss may compel the others to contribute.

Contribution as between co-trustees 2.

Nothing in this section shall be deemed to authorize a trustee who has been guilty of fraud to institute a suit to compel contribution.

(Notes).

1.—“Several liability of co-trustees.”

(1) Section explained.

“There is no primary liability in respect of a breach of trust, all parties to it being equally liable for the whole of the loss occasioned by the wrongful act or default, and it is no objection, to a suit brought by parties seeking relief against a breach of trust, that one of the defendants, against whom no relief is prayed, may have been a party to such breach of trust.” *Wilson v. Moore*, 1 M. and K. 127. C

(2) Joint liability taken away by express contract.

(a) The joint liability of trustees may be taken away by express contract. *Burks v. Betty*, 6 Madd. 90. D

(b) Thus where it is agreed that each trustee shall receive, and be answerable only for a certain portion of the trust estate, each trustee will only be liable for the amount in his own custody. *Burks v. Betty*, 6 Madd. 90. E

2.—“Contribution as between co-trustees.”

(1) Principle as to contribution.

(a) Where trustees are equally to blame for a breach of trust, they are jointly and severally liable to the *cestui que trust*, and when one of them makes good the breach, he is entitled to contribution from the others. *Challinworth v. Chambers*, 1 Ch. 685. F

(b) Where there is no distinction between the guilt of the trustees, and one of them has been compelled to bear the whole, or a greater portion of the loss, he can institute a suit for contribution against his co-trustees. *Barks v. Micklethwait*, 33 Beav. 409. G

(2) Contribution between co-trustees.

(a) Where one of the trustees of a settlement allowed his co-trustee to invest the trust fund, and the latter handed it to an “outside broker,” who misappropriated some part of it, it was held that both trustees were *in pari delicto*, and consequently that the latter was entitled to contribution from the former, although he had taken a more active part in the transaction which led to the loss. *Robinson v. Harkin*, 2 Ch. 415. H

(b) The test to determine whether there can be contribution is to see whether the trustees are equally to blame. Godefroi, p. 948. I

(c) A passive trustee is, in general, as much to blame as the active trustee. *Bacon v. Camphausen*, 58 L T. 851. J

(3) Extension of the rule to persons who meddle with trust-property.

The rule as to the contribution also applies, not only, to express trustees, but to all those who meddle with trust-property with notice of the trust. *Blyth v. Flaugate*, 1 Ch. 337. K

(4) Liability of representatives of deceased trustee.

(a) The representative of a deceased trustee is not liable for a breach of trust committed after his death, if he has left the trust-fund in a proper state of investment. *Re Peck, Chamberlain v. Drake*, 41 W.R. 23. L

2.—“Contribution as between co-trustees”—(Continued).

(b) But he may be liable, if he has not left it in a proper state of investment.
Gibbins v. Taylor, 22 Beav. 344. **M**

(c) The right of contribution exists, when one of the trustees has died, as against his representatives. *Jackson v. Dickinson*, 1 Ch. 947. **N**

(5) Where trustee is incidentally benefited.

(a) Even where a trustee incidentally benefits by breach, he is not always liable to indemnify co-trustee. *Balun v. Hughes*, 31 Ch. D. 390. **O**

(b) Thus the fact of a borrower of trust-funds on insufficient security repaying, out of the money so borrowed, a debt due from him to one of the trustees, is not, of itself, sufficient to render the trustee accepting repayment liable, the borrower being under no restriction as to its application. *Chillingworth v. Chambers*, 1 Ch. 685. **P**

(6) Exceptions to the general right of contribution—English law.

There are at least three exceptions to the general right of contribution.

(i) Where the trustee has himself benefited by the wrongful act or omission.
Chillingworth v. Chambers, 1 Ch. 685. **Q**

(ii) Where the trustee is a solicitor. *Lockhart v. Reilly*, 25 L. J. Ch. 697;
Thompson v. Fitch, 22 Beav. 316. **R**

N B. 1.—But in one case it was held that the mere fact of the trustee being a solicitor did not disentitle him to the right for contribution. The Court was of opinion that, where the other trustee was an active participator in the breach of trust, the right of contribution existed.
Head v. Gould, 2 Ch. 265. **S**

N B. 2.—The true reason of the exception in the case of solicitor is not that such solicitor is better versed in trust business because of his profession, but that he is the solicitor to the trust. See *Elvidge v. Bellingham*, 37 Sol. J. 600. **T**

(iii) Where the trustee is also a beneficiary under the instrument. *Chillingworth v. Chambers*, 1 Ch. 685 **U**

N B. 1.—This exception is based “on the concurrence of the trustee in committing a breach of trust affecting his own property, and therefore his own trust-property is the first fund to make good the breach; but after that property is exhausted, the right of contribution would arise as to the balance remaining necessary to make good the breach.”
(*Ibid.*) **V**

N.B. 2.—Trustee—beneficiary is generally bound to indemnify co-trustee to the extent of his beneficial interest. See *Chillingworth v. Chambers*, 1 Ch. 685. **W**

(7) Contribution when not allowed.

(a) If the trustees act fraudulently, the Court will not interfere to enforce contribution. *Lingard v. Bromley*, 1 V. and B. 114. **X**

(b) There can be no contribution between wrong-doers. *Lingard v. Bromley*, 1 V. and B. 114. **Y**

2.—“*Contribution as between co-trustees*”—(Concluded).

(8) **One trustee taking more active part in breach of trust solely chargeable.**

(a) Where it appears that one trustee took a more active part in the breach of trust, the loss as between the trustees may be thrown upon the more guilty party. *Lockhart v. Reilly*, 1 De G. and J. 476. **Z**

(b) In such a case such trustee will be ordered to indemnify the passive trustee. (*Ibid.*) **A**

(c) If he be dead, his estate would be liable. (*Ibid.*) **B**

(9) **Contribution among co-trustees—Limitation—English law.**

As between the trustees, time does not begin to run under the Statute of Limitations until the judgment declaring them liable for breach of trust. *Robinson v. Harkn*, 2 Ch. 415. **C**

(10) **Suit for contribution—*Cestuis que trustent* when can be made parties.**

(a) If any of the *cestuis que trustent* has participated in the breach of trust, they must be made parties. *Jesse v. Bennett*, 6 D.M.G. 609. **D**

(b) To render the beneficiary liable to indemnify a trustee, he must have known that the act was a breach of trust. Underhill, p. 409 **E**

(11) **Contribution not enforced in suit against trustee for breach of trust.**

A separate suit must be instituted for contribution. It cannot be enforced in a suit against the trustee to make good the breach of trust *Fletcher v. Green*, 33 Beav. 513 **F**

(12) **Contribution in respect of costs.**

In one case where a decree was passed against several trustees with costs, which had been paid by one of them, the Court, on consent, decreed contribution in respect of the costs. *Pitt v. Bonner*, 1 Y. and C.C.C. 670 **G**

(13) **Suit for contribution—Impounding fund in Court.**

(a) If there is any fund in Court in the suit, which is payable to the trustee against whom contribution is sought, the Court will impound the fund in order to make good what is due from him. Tagore Law Lectures, 1881, 207 **H**

(b) Thus, if a fund in Court is set apart to pay a legacy bequeathed to one of two defaulting trustees, who has paid no part of the balance due from him, the other trustee, who has paid the whole, is entitled to ask the Court to impound the fund, in order to make good the share of the debt, which the person, who was both trustee and legatee, ought to have paid. *Binks v. Micklethwait*, 33 Beav. 409. **I**

(14) **Several trustees involved in breach of trust—Practice as to costs**

(a) Where several trustees are involved in a breach of trust, the Court would decree the costs of the suit against them all. *Lawrence v. Bowle*, 2 Phill. 140. **J**

(b) The principle on which the Court would act is that of giving the plaintiff the greater security for the payment, and without regard to the relative degrees of culpability in the defendants. (*Ibid.*) **K**

(15) **Breach of trust committed at the instigation or request, or with consent of beneficiaries—Liability of trustees.**

See Underhill, p. 408. **L**

28. When any beneficiary's interest becomes vested in another person, and the trustee, not having notice of the vesting, pays or delivers trust-property to the person who would have been entitled thereto in the absence of such vesting, the trustee is not liable for the property so paid or delivered.

Non-liability of trustee paying without notice of transfer by beneficiary.

(Note).

Section exemplified.

If a *cestui que trust* mortgages his reversionary interest in a trust-fund, the trustee should be informed of the charge by the mortgagee, and if he is not informed, and the trustee remains without notice of the charge and pays over the sum charged to the *cestui que trust*, the trustee will not be liable to the mortgagee. *Jones v. Gibbons*, 9 Ves. 410. **M**

29. When the beneficiary's interest is forfeited¹ or awarded by legal adjudication to Government², the trustee is bound to hold the trust-property to the extent of such interest for the benefit of such person in such manner as the Government may direct in this behalf.

Liability of trustee where beneficiary's interest is forfeited to Government.

(Notes).

General.

Reason of the rule in the section.

The property of persons convicted of certain offences is liable to forfeiture. In such cases, the offender is incapable of acquiring any property, except for the benefit of Government, until he has undergone the punishment awarded, or the punishment to which it shall have been commuted, or until he shall have been pardoned. Tagore Law Lectures, 1881, 126, see S. 61, Penal Code, see also Whit. Stokes, Vol. I, p. 826. **N**

1.—“Forfeited.”

Law as to forfeiture of property in British India.

See S. 62, Penal Code (1860). **O**

2.—“Government.”

“Government”—Meaning.

See ACT XLV of 1860 (PENAL CODE), S. 17. **P**

30. Subject to the provisions of the instrument of trust and of sections 23 and 26, trustees shall be respectively chargeable only for such moneys, stocks, funds, and securities as they respectively actually receive, and shall not be answerable the one for the other of them, nor for any banker, broker, or other person in whose hands any trust-property may be placed, nor for the insufficiency or deficiency of any stocks, funds, or securities, nor otherwise for involuntary losses.

Indemnity of trustees 1.

(Notes).

I.—“*Indemnity of trustees.*”(1) **Application of section.**

In applying this section, it must be borne in mind that it is expressly subject to the provisions of the instrument of trust and of Ss. 23 and 26 of the Act. 6 Bom. L. R. 906=29 B. 170 (185) Q

(2) **Scope of section.**

This section affords no help to a trustee whose liability arises out of a distinct breach of trust. 29 B. 170=6 Bom. L. R. 907. R

(3) **Practice as to introducing indemnity clause in instruments of trust.**

An instrument of trust drawn according to the English form, whether a will or a deed, usually contains a clause, declaring that one trustee shall not be answerable for the receipts, acts, or defaults of his co-trustee. But the proviso, while it informs the trustee of the general doctrines of the Court, adds nothing to his security against the liabilities of his office. A Court of Equity infuses such a clause into every instrument creating a trust, it comes, therefore, to little more than what a Court of Equity will do without any direction, and a person can have no better right upon the expression of what would, if not expressed, be implied. *Worrell v Hanford*, 8 Ves. 8, see, also, 7 Bom. L. R. 691 (696). S

(4) **Effect of indemnity clause.**

(a) Such a clause only protects a trustee from liability for losses, when his acts have been justifiable. *Rehden v. Wesley*, 29 Beav. 213. T

(b) Where a trustee invests in a security authorized by the instrument of trust, and the security fails, he will not be liable. (*Ibid*) U

(c) In order to exempt a trustee from liability for a breach of trust, in respect of any of the acts of a co-trustee, by force of an express declaration in the instrument of trust, the declaration must be of the very strongest kind, and no declaration, however strong, can exempt a trustee from liability, if he has been guilty of gross misconduct. Tagore Law Lectures, 1881, p. 209. Y

(5) **Every trust instrument deemed to contain clauses for indemnity and reimbursement of trustees.**

See ACT XXVIII OF 1866 (TRUSTEES AND MORTGAGEES' POWERS), S. 37. W

(6) **Employment of agent—Indemnity clause—Burden of proof.**

(a) The indemnity clause casts the *onus* of proof on those, who seek to charge a trustee with a loss arising from the default of an agent, when the propriety of employing an agent has been established. *In re Briar*, 26 Ch. D. 238, cited in 6 Bom. L. R. 907=29 B. 170. X

(b) But where there is a clear breach of duty in the employment and supervision of the agent, the liability of the trustee for breach of trust arises. 6 Bom. L. R. 906=29 B. 170. Y

CHAPTER IV.

OF THE RIGHTS AND POWERS OF TRUSTEES.

31. A trustee is entitled to have in his possession the instrument of trust and all the documents of title ¹ (if any) relating solely to the trust-property.

Right to title-deed.

(Notes).

General

Ss. 31 to 35 deal with the rights of trustees, and 36 to 45 deal with their powers. Z

1.—“A trustee....possession. . documents of title.”

(1) General rule as to custody.

This section is but one rule amongst several relating to the possession of title-deeds. The most general rule is that the person, who, for the time being, is entitled to the property for an estate at law and in possession not less than free-hold, has a right to their custody. (Griffith, p. 88). A

(2) Trustee's right to custody of title-deeds

(a) The legislature gives the custody of the instrument of trust, and other title-deeds in connection therewith, with a view to enable the trustee to discharge his duties efficiently. The custody enables him to know the directions and purpose of the trust. The very nature of his office and its duties require the trustee to be in possession of all the documents of title to the trust property. *Stanford v. Roberts*, 6 L R. Ch. App. 307. B

(b) The title-deeds of an estate form no part of the usufructuary enjoyment, and, therefore, if a person vests an estate in trustees upon particular trusts, one of whom is to receive the rents and pay them over to the settlor for life, and the deeds are delivered into their possession, they have a right to the custody of them for the benefit of all parties interested. *Garnier v. Hannington*, 22 Beav. 630. C

(c) The trustees are entitled to have the custody of the instrument creating the trust and of all muniments of title relating to the trust estate, and they would be guilty of a breach of duty, if, where there is a trust to perform, they willingly suffer the title-deeds or muniments relating to the trust property to get out of their possession. *Meuz v. Bell*, 1 Hare 95. D

(d) Their duty being to maintain and defend all suits necessary for the protection of the trust estate, it follows, as a necessary consequence, that they must have the documents relating to the trust. *Goode v. Button*, 11 Jur. 851. E

(e) In general it is the duty of the trustees to keep their muniments of title, as well as their securities, under their own control. *Field v. Field*, (1894), 1 Ch. F

I.—“A trustee....possession....documents of title”—(Continued).

(3) Title-deeds left with settlor—Whether trustees liable.

If the settlor obtains them from the trustees and thereby becomes entitled to deal with the estate as absolute owner, the trustees, if it appeared they had acted fraudulently and under such gross negligence as amounted to constructive fraud, would be held personally responsible for the consequences. *Evans v. Bicknell*, 6 Ves 174. G

(4) Tenant for life—When entitled to custody.

(a) A tenant for life, if the estate be legal, is entitled to retain the title-deeds. *Foster v. Crabb*, 12 C.B. 136. But see *Gainer v. Hannington*, 22 Beav. 627; *Webb v. Webb*, 1 Eden 8, *Duncombe v. Mayer*, 8 Ves. 320. H

(b) As equity follows the law, the Court, in the absence of special trusts requiring the possession of the deeds by the trustees, will not take the deeds from the tenant for life who has got possession of them. *Taylor v. Sparrow*, 4 Giff. 703, *Denton v. Denton*, 7 Beav. 388. I

(5) When tenant for life could sue for deeds

Unless a tenant for life has shown that he cannot be safely entrusted with the deeds, he may take proceedings in equity for the recovery of them. *Gainer v. Hannington*, 22 Beav. 627. J

(6) Mortgage of life estate—Trustee's right to title-deeds.

Mortgagees of life estate are entitled to insist on the retention of the deeds by the trustees. *Re Neuen*, (1893), 2 Ch. 369. K

(7) When cestui que trust may sue for title-deed.

Where the legal estate, whether of freeholds, or copyholds, or leaseholds, is vested in a trustee or executor in trust, not for certain persons entitled in succession, but for the cestui que trust entitled absolutely in possession, the cestui que trust, or, if he be an infant, his guardians, may institute proceedings to have the deeds delivered up to them. *Smith v. Panner*, per Wood, V.C., 18th July 1852. L

(8) Leaseholds—Executor's right to custody.

But as to leaseholds, an executor may hold the deeds, until all debts have been paid and the estate cleared. (*Ibid.*) M

(9) Trustee-in-bankruptcy—Custody.

The trustee in bankruptcy of the husband of a legal tenant for life has no right to retain the title-deeds during the coverture, but, where the circumstances require it, they will be ordered to be brought into Court for safe custody. *Ex parte Rogers*, 26 Ch. D. (C.A.) 31. N

(10) Right of cestui que trust to inspect documents.

Cestui que trust have a right, at all reasonable times, to inspect the documents concerning the trust. *Re Cowm*, 31 Ch. D. 179. O

(11) Right of cestui que trust to copies of documents, etc

(a) They have a right to be furnished with such copies. *Wynne v. Humbeston*, 27 Beav. 421. P

(b) They are entitled also to be furnished with copies of cases submitted and opinions of counsel taken by the trustees for their guidance, in the

1.—“A trustee....possession....documents of title”—(Continued).

discharge of their duty towards the trust estate, because the expense falls upon the trust estate, and it is reasonable that the *cestui que trust* may see the opinions and the cases for which they are charged.
(*Ibid.*) Q

(12) When such right arises

The right does not arise until the relation of trustee and *cestui que trust* has been established to the satisfaction of the Court. (*Ibid.*) R

(13) When title-deeds may be with the solicitor.

When the assets due to the estate are realised, the title-deeds have to be in the hands of the solicitor. While other securities should not be left with the solicitor, the title-deeds alone may be left with him, if, for instance, the trust was in course of development as a building estate.
Field v Field, (1894), 1 Ch. 425. S

(14) Bearer bonds—Solicitor.

But bearer bonds and share certificates ought not to be left in the hands of solicitors or any other agent. (*Ibid.*) T

(15) Bonds to bearer—One-half by each of two trustees—Absconding by one—Liability of other.

Where bonds to bearer were by arrangement held as to half by each of two trustees, and one absconded with the bonds, *held*, the other was held liable. *Lewis v. Nobbs*, 8 C.D. 591. U

(16) Securities held by trustee who is debtor to estate.

Where one trustee, being a debtor to the trust estate, upon an equitable mortgage by deposit of title-deeds, was allowed to retain them, his co-trustees were held liable for a loss so occasioned. *Chandler v. Trillet*, 22 Beav. 257. Y

(17) Mode of protecting deeds.

(a) Title-deeds, debentures, bonds to bearer, and other evidences of title to securities, must necessarily be left in the hands of one of several trustees. *Hall v. Franck*, 11 Beav. 519, *Collins v. Easter Counties Rail Co*, 1 J. and H. 243. *Field v. Field*, (1894), 1 Ch. 425. W

(b) But where the deeds are a security for money, the possession by one trustee is no implied authority from the co-trustee, to him who holds them, to receive the principal money secured. (*Ibid.*) *Goldney v. Bower*, 1 J. and H. 247. X

(18) Safe way of deposit of deeds.

(a) The most prudent course is to deposit them at a bank, in trust for all the trustees, with directions to the bankers that the box, in which they are placed, should not be removed without the authority of all the trustees. *Menges v. Guedalla*, 2 J. and H. 259. Y

(b) Another way is that the box should have as many different locks as there are trustees, each trustee holding a key, and then, if the bankers have been properly instructed, and the box has to be opened, one may have all the keys. (*Ibid.*) Z

I.—“A trustee ...possession...documents of title”—(Concluded).

(19) When trustees liable for not taking such precautions.

The Court generally would not hold the trustees liable for not taking such precautions as these, but they must, in the absence of absolute safety, do all they can to protect the property and rely upon the observance of this obligation to discharge themselves in case of loss. *Collam v. Easter Counties Ry. Co.*, 1 J. and H. 243. **A**

(20) Non-negotiable trust securities—Mode of deposit.

When trust securities are non-negotiable, the trustee cannot strictly, as of right, insist on having them placed so as only to be accessible jointly. *Re Sassoon*, 1903, 1 Ch. 262. **B**

(21) “Bearer” securities—Deposit.

(a) “Bearer securities” should not be left with the trustees. *Chandler v. Tillet*, 22 Beav. 257; *Lewis v. Nobbs*, 8 Ch. D. 591. **C**

(b) They should be placed in a box in the custody of a banker. *Re de Pothouner Dent v. De Pothouner*, (1900), 2 Ch. 529. **D**

(22) Theft by one trustee—Fraud—Liability of co-trustees

Where a robbery by one of the trustees, who had given proper directions to the banker, took place by means of his fraud in obtaining the box by false statements to the bankers his co-trustees were not held responsible. *Mendes v. Guedalla*, 2 J. and H. 259 **E**

32. Every trustee may reimburse himself ¹, or pay or discharge

Right to reimbursement of expenses out of the trust-property, all expenses properly incurred in or about the execution of the trust ², or the realization, preservation, or benefit of the trust-property, or the protection or support of the beneficiary.

If he pays such expenses out of his own pocket ³, he has a first charge upon the trust property for such expenses and interest thereon ⁴; but such charge (unless the expenses have been incurred with the sanction of a principal Civil Court of original jurisdiction) shall be enforced only by prohibiting any disposition of the trust-property without previous payment of such expenses and interest ⁵.

If the trust-property fail, the trustee is entitled to recover from the beneficiary personally on whose behalf he acted, and at whose request, expressed or implied, he made the payment, the amount of such expenses ⁶.

Where a trustee has, by mistake, made an over-payment to the beneficiary, he may reimburse the trust-property out of the beneficiary's interest. If such interest fail, the trustee is entitled to recover from the beneficiary personally the amount of such over-payment.

Right to be recouped for erroneous over-payment ⁷.

(Notes).

1.—“Every....reimburse....himself.”

General.

(1) Practice.

A Court of Equity always deals liberally with the trustee acting *bona fide*, so far as reimbursement is concerned. (*Cowdrey*, 6 Ir. R. Eq. 92). F

(2) General rule as to reimbursement.

It follows from the very nature of the office, whether expressed in the instrument of trust or not, that the trust property shall reimburse the trustee all the charges and expenses incurred in the execution of the trust. *Worrall v. Harford*, 8 Ves. 8, *Dawson v. Clarke*, 18 Ves. 254. G

(3) Trustees wrongfully appointed.

Even where trustees had been wrongfully appointed, but acted *bona fide*, and believed themselves to have been duly appointed, they should be allowed their costs, charges and expenses, notwithstanding the defect of title. *Travis v. Illingworth*, W N. 1868, p. 206. H

(4) Trustees under the Settled Land Act, 1882.

The Settled Land Act of 1882 expressly authorises trustees of a settlement to reimburse themselves or pay and discharge, out of the trust property, all expenses properly incurred by them *Vide* S. 43 of S.L.A. (1882). I

(5) Reimbursement—When trustee is entitled to

(a) If a trustee, as defendant, be ordered to pay the plaintiff's costs, he will, unless he has forfeited his right by some misconduct, be entitled, as between him and the *cestui que trust*, to be reimbursed the costs which he has paid, and also those which he has incurred. *Lowat v. Fraser*, 1 L.R.N.L. Sc. 37, *per Knysdown*. J

(b) Whether, in the litigation which he undertook, he be successful or not, he would be entitled to his costs, but a trustee has no claim to reimbursement, where the legal proceedings were occasioned by his own negligence. *Caffrey v. Darby*, 6 Ves. 497 K

(c) Nor would he be entitled to costs, if the proceedings were improperly instituted. *Peers v. Ceeley*, 15 Beav 209, *Ired Law v. Chawner*, 4 K. and T. 458. L

(6) Trustee—Whether entitled to interest on costs.

(a) The trustee is not entitled to interest on costs, though, at the time he paid them, he had no trust money in his hands. *Gordon v. Fial*, 8 Price 416. M

(b) But if he pays off a debt carrying interest, he stands in the place of the creditor in respect of interest. *Finch v. Prescott*, 17 L.R. Eq. 554. N

(7) Set-off of debts due by trustee.

The debt due by a trustee to the trust estate may be set off, as against the costs he may be entitled to, by way of reimbursement. *Jagger v. Jagger*, 1 R. 25 Ch. D. 729. (See *Underhill*, p. 379.) O

2.—“All expenses properly . . . trust.”

(1) Expenses must be concerning the trust.

The expense must have been incurred in or about the execution of the trust,
(*Courteney v. Rumfry*, 6 Fr. R. Eq. 99).

(2) Travelling expenses.

A trustee will be entitled to be reimbursed his travelling expenses, *ex parte*
Lovegrove, 3 D. and C. 763.

(3) Engagement of solicitor.

A trustee could employ a solicitor for the better administration of the trust
estate and charge the expenses on the estate. *Macnamara v. Jones*,
2 Duck. 587.

(4) Expenses must be properly incurred.

(a) But the condition is that the expenses should have been properly incurred.
Malcolm v. O'Callaghan, 3 M. M. and Cr. 52, *Watson v. Row*, 18 L.R.
Eq. 680.

(b) What expenses are proper and what not is a question depending upon the
circumstances of each case. (*Leadham v. Chauver*, 4 K. and T. 458) T

(5) The following have been held to be proper expenses and allowed

(a) Damages which a trustee had to pay to a third person, for negligence of a
person employed in the trust property. *Bennet v. Wyndham*, 4 D.
F. and J. 259.

(b) Costs of former trustees, paid by a trustee to their personal representatives,
previously to the latter transferring the trust estate (*Harvey v. Ol-
ver*, W.N. 1887, p. 149).

(c) Costs incurred by the donee of the power of appointment in relation to
the trustees' employment (*Ibid*)

(d) Costs incurred by him, previously to his appointment, in obtaining state-
ment of trust property. *Humphrey*, 22 Ch. D. 255.

(e) Calls he is obliged to pay upon the shares, if he be a trustee of shares.
(*James v. May*, 6 H.L. 328).

(f) Solicitors' costs paid for services in the matter of the trust. (*Macnamara*
v. Sone, Duck, 587).

(g) Costs of administration suit, if the trustees are not guilty of misconduct
(*Burks v. Mucklethwait*, 34 L.J. Ch. 364).

(h) Payments made by trustees in the shape of public subscriptions, only when
such payments have been made bona fide and reasonably with the
object of benefiting the estate. *Howe v. Lord Winterton*, 51 W.R. 26.
See, also, *Walker v. Duncombe*, 1 Ch. 879.

(6) In the following cases the expenses have not been allowed, because they were not properly incurred.

(a) The trustee's costs, if he has not joined the other trustees in the same
action. (*Gompertz v. Kensit*, 26 L.J. 95).

(b) His costs, if he acts unreasonably by neglecting to transfer for a number of
years the trust property to the beneficiary after constant demands.
Knox, 195 (2 Ch. 482).

2.—All expenses properly . . . trust ”—(Continued).

(c) Expenses incurred in unsuccessfully defending an action without the sanction of Court, and without having reasonable grounds of defence. (*Domnes v. Cottane*, 1893, 1 Ch. 547). **E**

(d) Costs of legal advice, not necessary in the execution of the trust, but incurred out of excess of caution. (*Warter v. Anderson*, 11 Hare 301). **F**

(e) Costs incurred by him, in respect of a suit for administration of the estate, by his own unlawful neglect of duty. *Jeffreys v. Marshall*, 23 L.J. 548. **G**

(f) Law costs unnecessarily incurred by the trustee, out of too much caution. *Warter v. Anderson*, 11 Hare 301. See *Underhill*, p. 353, and *Lewin*, p. 814. **H**

(g) Costs of an action brought by him unnecessarily. *Fane*, 41 L.J. 551. **I**

(7) Trustees employing one of themselves as solicitor.

Trustees, if they employ one of themselves as solicitor, instead of engaging a third person, will be answerable for all the consequences, if they be misled by the professional advice of such trustee-solicitor. *Alton v. Harrison*, *Lewin*, p. 771 (11th Ed.). **J**

(8) Trustee may give fees to Counsel.

A trustee is entitled to pay fees to Counsel, and shall have allowance thereof *Cary*, 14, *Poole v. Pass*, 1 Beav. 600 **K**

(9) Costs of opposing a Bill in Parliament

A trustee will be allowed the—which affects the trust estate. *Re Nicoll's Estates*, W.N. 1878. **L**

(10) Trustee—whether entitled to extra costs.

If a trustee be sued by a stranger concerning the trust and have his costs paid him as between party and party, and the *cestui que trust* should afterwards sue him for an account, the trustee should be allowed his necessary costs in the former suit. *Amand v. Bradburne*, 2 Ch. Ca. 138, *Ramsden v. Langley*, 2 Vern. 536, *Lorat v. Fraser*, L.R. 1 H.L. 24; *Ferus v. Young*, 10 Ves. 184. **M**

(11) Costs in defending his conduct in administering the trust.

Where a suit, instituted by the beneficiary against the trustee, to set aside a compromise entered into by the latter with another, on the ground of fraud, was dismissed, *held* that the defendant was entitled to have his costs discharged out of the trust estate, for the defence was undertaken by him for the benefit of the estate. *Walters v. Woodbridge*, L.R. 7 Ch. D. 504; *Re Llewellyn*, L.R. 37 Ch. D. 317; *Re Beddoe* (1893), 1 Ch. 547. **N**

(12) Trustee entitled to allowance for expenses besides remuneration for his trouble.

Even where there is a specific remuneration given by the testator to his trustees for their services in the trust, the trustee is entitled to his usual expenses. *Wilkinson v. Wilkinson*, 2 S. and S. 287; *Webb v. Earl of Shaftesbury*, 7 Ves. 480. **O**

2.—“All expenses properly . . . trust”—(Continued).

(13) Extraordinary expenses—Whether trustee is entitled to.

Where extraordinary expenses were incurred by a trustee, without any possibility of being a gainer, and where the result of such expenses was that the *cestui que trust* was discharged from a loss, or from a plain and great hazard of it, the trustee should be re-paid. *Balsh v. Hyham*, 2 P. W. 455, *Sandon v. Hooper*, 6 Beav. 246. P

(14) Costs of Attorney or Solicitor.

An attorney or solicitor can only charge his *cestui que trust* expenses and costs out of pocket, and then only for services strictly professional, and not for matters which an executor ought to have done without the intervention of a solicitor, such as for attendances to pay premiums on policies, attending at the bank to make transfers, etc. *Darby v. Harbin*, 28 Beav. 325. Q

(15) Expenses of executors—Employment of agent.

(a) Although trustees and executors will not, as a general rule, be allowed any remuneration for their own trouble and loss of time, they may, in special cases, employ agents, whose expenses will be allowed out of the estate. *Robinson v. Pett*, 2 W. and T. L. C. 606. R

(b) So, a trustee, upon making out a proper case, may employ a bailiff to manage an estate and receive the rents, even though a recompose may have been given him by the creator of the trust for his trouble. (*Ibid*) S

(16) Debts incurred by trustee—Right of indemnity—Creditor's right to stand in the place of trustee.

(a) Where the owner of an hotel, on the occasion of her marriage with B, appointed her husband trustee by a deed of settlement, and where the trust deed gave the trustee power through managers and assistants to carry on the business of the hotel, and it was also declared that the trustee should be at all times fully indemnified, out of the trust estate, in respect of all liabilities arising from the execution of the trusts, held, in a suit brought by the plaintiffs against the trustee, for goods supplied to the hotel, claiming the trustee's right of indemnity, that the plaintiffs were entitled in equity to stand in the place of the trustee. 31 C. 1084. T

(b) Such right of the creditor is subject to the important qualification that, if the trustee, through his own default, has lost his right of indemnity, he will not be entitled to it, for the creditor cannot have the benefit of that which does not exist. 31 C. 1084 (at 1089). U

(17) Void trust—Expenses—Right of trustee.

(a) The trustee of a void trust cannot charge his expenses, as against persons who establish the invalidity of the deed. *Smith v. Dresser*, L.R. 1 Eq. 651; *Ex parte Russel*, L.R. 19 Ch. D. 588. Y

(b) But he will be allowed his charge for improvements he has effected upon the estate. *Woods v. Axton*, W.N. 1866, p. 207, *Dutton v. Thompson*, 23 Ch. D. 278. W

2.—“*All expenses properly . . . trust*”—(Concluded).

(18) **Voluntary trust—Setting aside of—Trustee's right to expenses.**

Where a voluntary settlement was set aside, at the instance of the settlor, on the ground of improvidence and having regard to her youth, the trustees, in the absence of any evidence of improper motive, were allowed their costs, charges, and expenses properly incurred. *Everitt v. Everitt*, 10 L.R. Eq. 405; *James v. Couchman*, 29 Ch. D. 212 at 217. **X**

(19) **Advance to trustee by *cestui que trust*—Right of the latter**

If trustees have a right to raise a certain sum which is properly chargeable on the corpus, and a *cestui que trust*, at the request of the trustees, advances money for the purpose, the *cestui que trust* stands in the place of the trustees, and has a lien on the corpus for the amount. *Todd v. Moorhouse*, L.R. 19 Eq. 69. **Y**

(20) **Trustee's agents—Their liability to account**

The agent of a trustee is accountable to the employer only, and not to the *cestui que trust*. *Myler v. Fitzpatrick*, 6 Madd 360 **Z**

(21) **Trustee's agents—Their liability as trustees *de son tort*.**

The agents of trustee become liable to the *cestui que trust*, where they have not confined themselves to their duties as agents, but, by accepting a delegation of the trust, or by fraudulently mixing themselves up with a breach of trust, have themselves become trustees *de son tort*. *Lee v. Stanley*, 15 Eq 204; *Myler v. Fitzpatrick*, 6 Madd. 360, *Hardy v. Caley*, 33 Beav 365, *Re Barney* (1892), 2 Ch. 265, *Mara v. Browne*, (1896), 1 Ch 199; *Midgley v Midgley*, (1893), 3 Ch 282 **A**

(22) **Trustee of two estates—Incurring expenses in respect of one estate—His right to recoup it from the other**

(a) If a person be trustee of different estates, for the same *cestui que trust* under the same instrument, and he incurs expenses on account of one estate in respect of which he has no funds, the presumption arises that he may apply to their discharge any money which has come to his hands from any other of the estates. *Price v Leadon*, 21 Beav. 508. **B**

(b) But he cannot mix claims under one instrument of trust with those under another. (*Ibid.*) **C**

(c) Similarly, if different estates are held under the same instrument for different *cestui que trust*, the trustee cannot reimburse himself, from one estate, the losses incurred in a *bona fide* administration of the other estate. *Fraser v. Murdock*, 6 App Cas 855; *Re Johnson*, 15 Ch. D 548. **D**

3.—“*If he pays such expenses . . . pocket.*”

(1) **Expenses out of pocket.**

Though a trustee is allowed nothing for his trouble, he is allowed everything for his expenses out of pocket *How v. Godfrey*, 361; *Hude v. Haywood*, 2 Atk. 126. **E**

(2) **Account of expenses to be kept by trustee.**

Generally a regular account of the expenses incurred by the trustee should be maintained by him. *Hethersell v. Hales*, 2 Ch. Rep. 158. **F**

(3) **Failure to maintain account—How it affects his allowance.**

Where the trustee failed to maintain account, the Court ordered a reasonable allowance to be made to him, discouraging, at the same time, his remissness and negligence in not maintaining proper accounts. (*Ibid.*) **G**

4.—“*He has....interest thereon.*”(1) **Expenses, a lien upon the estate.**

The expenses incurred by a trustee, in the execution of his office are a first charge or lien upon the estate. *Ex parte James*, 1 D. and C. 272 ; *Hill v. Magan*, 2 Moll. 460. **H**

(2) **Lien, when paid.**

In a suit for the administration of the trust, in respect of which the expenses have been incurred, the lien of the trustee will be paid even before the costs of the suit. *Morison v. Morison*, 7 De G. M. and G. 226. **I**

(3) **Lien—Nature of.**

(a) The expenses incurred by the trustee are a first charge upon the corpus of the estate. *Re Exhall Coal Company*, 35 Beav. 449. **J**

(b) They are also a first charge upon the income. *Scott v. Milne*, 25 Ch. D. (C A.) 710. **K**

(4) **Lien how enforced.**

(a) NO FORECLOSURE OR SALE.

Courts of law cannot order a trustee's lien to be realised by giving a decree for foreclosure or sale, for it would have the effect of destroying the trust estate. *Darke v. Williamson*, 25 Beav. 622. **L**

(b) DELIVERY OF DEEDS—PROHIBITING DISPOSITION OF TRUST-PROPERTY.

The proper course for such realization is to deliver the deeds into his custody and prohibit any disposition of the property without previous discharge of the trustee's lien. (*Ibid.*) **M**

(5) **Trustee's lien entitled to priority.**

The trustee's lien for his expenses on the property takes precedence of all beneficial interests, so that such expenses shall have to be paid in priority to the claims of the beneficiaries. *Dodds v. Tuke*, 25 Ch. D. 617. See *Jones v. Owen*, 1 Ch. 807 ; (Lewin, p. 1239 ; Underhill, p. 353). **N**

(6) **Lien does not extend to trustees' agent.**

(a) Although the trustees are creditors upon the trust fund for the amount of their expenses, the persons who are employed by them, as solicitors, surveyors, etc., have no such lien, because they are solicitors of the trustees personally, and not of the trust estate. *Stanier v. Evans* 34 Ch. D. 470. **O**

(b) But a positive direction to the trustees to employ a particular person and allow him a salary will constitute a trust in his favour and give him a claim against the trust fund. *Williams v. Corbet*, 8 Sim. 349. **P**

(7) **Precatory trust—Lien.**

In a precatory trust, the solicitors, etc., of the trustees have no such lien. *Shaw v. Lawless*, 1 Le. and G. 154. **Q**

(8) **Trustees' right to indemnity—When to be enforced.**

When a trustee has a right of indemnity out of the estate, he may at any time come to Court to enforce it, and is not under any obligation to wait, until the trust estate has been turned into money under the administration of the trust. *Re Pumpry*, 22 Ch. D. 255. **R**

4.—“*He has....interest thereon*”—(Continued).

(9) **Trustee carrying on business—Lien against the trust property.**

If a trustee is authorised to carry on a business, and to employ certain specific property for that purpose, he has a right to the benefit of indemnity and lien against the property devoted to the business. *Re Johnson*, L.R. 15 Ch. D. 548. **S**

(10) **Creditors of the trustee—Right of**

The creditors of the business also have a right to the benefit of the same indemnity and lien, as the trustee. *Re Blundell*, L.R. 44 Ch. D. 1. **T**

(11) **Right of creditors—Subject to equities**

The right which the creditors have is subject to any equities subsisting between the trustee and the *cestui que trust* of the specific property. (*Ibid.*) **U**

(12) **Trustee in default—Effect of, on the creditors.**

Where the trustee is in default and is not entitled to indemnity except upon the terms of making good the default, the creditors will have no right to indemnity except upon the same terms. *Strickland v. Symons*, 26 Ch. D. (C.A.) 248. See *Boylan v. Fay*, 8 L.R. 1r. 374. **V**

(13) **Trustee for sale unauthorised—Right of creditors.**

Where the trustee for sale of a business carries on the business without authority, for the benefit of the beneficiary, and incurs liabilities to tradesmen in so doing, there is no right in the creditors to come against the estate, but they must look to the trustee personally. *Strickland v. Symons*, L.R. 22 Ch. D. 666, *affd.*, in 26 Ch. D. 245, *Re Evans*, L.R. 34 Ch. D. 597, *Re Gorton*, L.R. 40 Ch. D. 536 (543), *Jennings v. Mather*, (1901), 1 K.B. 106 and (1902), 1 K.B. 1 **W**

(14) **One of the trustees in default—Right of other trustees**

Where a business is carried on by trustees, a trustee who has a clear account is entitled to indemnity, independently of any default or breach of trust on the part of another trustee. *Re Frith*, (1902), 1 Ch. 312. **X**

(15) **One trustee in default—Right of creditors**

The creditors of the business have also got a right of indemnity, and this right arises by virtue of the trustee's right of indemnity, and is not precluded by the fact that one of the trustees has been found a defaulter. (*Ibid.*) See *M'Aloon v. M'Aloon*, (1900), 1 L.R. 367. **Y**

(16) **Executors—Testators' creditors—Their respective rights.**

Where the business is conducted, in accordance with the directions of the trust, by executors, and with the assent of the testators' creditors, in their interest as well as in that of the beneficiaries, the executors will be entitled, in priority to the claims of the testators' creditors, to be indemnified out of the general estate, against liabilities properly incurred. *Dowse v. Gorton*, (1891), A.C. 190. **Z**

(17) **Extent of the right of executors.**

The indemnity will not be limited to the portion of the assets which has come into existence since the testators' death. (*Ibid.*) **A**

4.—“*He has....interest thereon*”—(Concluded).

(18) Attachment of trust property by creditors—Circumstances under which creditors could claim right of indemnity.

Under a decree of the Presidency Small Cause Court (the decree being a personal one against the judgment-debtor), trust property, of which the judgment-debtor was the trustee, was attached in execution. *Held*, that, before the creditors could obtain a decree which they could execute against the trust property, they would have to show—

- (1) that the trust property under the terms of the settlement was devoted to the purpose of the trust business mentioned in the deed.
- (2) that the circumstances were such that the defendant as trustee would be entitled to be indemnified by the trust property.
- (3) that the plaintiffs as creditors were entitled to stand in the shoes of the trustee in respect of the indemnity, and to be recouped out of the trust estate. 28 C. 571. B

(19) Acts done in excess of powers—Trustee's lien.

There will be no lien for expenses incurred by trustees, in respect of an act done in excess of their powers and in breach of their duty towards the *cestui que trust*. *Teeedham v. Chawner*, 4 K. and J 458. C

(20) Right of trustee's creditors by subrogation.

The creditors of the trustee in the trust business have no right to directly claim payment out of the trust-estate, though they may, by subrogation, claim to have the benefit of the trustee's right to reimbursement. *Shearman v. Robinson*, 15 Ch. D. 548. (See Underhill, p. 357). D

5.—“*But such....expenses and interest.*”

Trustees—Mode of realising the amount.

The trustees have a right to retain their expenses out of the income, until provision can be made for raising them out of the *corpus*. *Scott v. Milne* 25 Ch. D. (C. A.) 710. E

6.—“*If the trust...beneficiary personally...expenses.*”(1) Mode of recovering expenses where there is no trust estate—Right to proceed against the *cestui que trust* personally.

If the trust estate fail, the trustee may then institute proceedings against the *cestui que trust*, on whose behalf and at whose request he acted, to recover from him personally the amount of the money he expended. *Balsh v. Hyham*, 2 P.W. 453; *Jervis v. Wolferstan*, 18 L.R. Eq. 18; *Hobbs v. Wayet*, 36 Ch. D. 256; *Whittakar v. Kershaw*, 45 Ch. D. 320; *Butler v. Crimpton*, 7 L.R. Eq. 16; *James v. May*, 6 L.R.H. L. 328; *Hardoon v. Belihos*, (1901), A.C. 118; *Wise v. Perpetual Trustee Company*, (1903), A.C. 139. F

2) When such right is lost.

The trustee cannot push his claim against the beneficiary personally, or against the trust estate, where he has incurred the outlay, not in the strict line of his duty, and without either the request or the implied assent of the *cestui que trust*. *Hosegood v. Pedler*, 66 L.J.Q.B. 21; *Ecclesiastical Commissioners v. Pinney*, (1900), 2 Ch. (C. A.) 736. G

6.—“If the trust....beneficiary personally....expenses ”—(Concluded).

(3) Funds out of which expenses of the trustee to be payable.

See *Brown v. Groombridge*, 4 Mad. 495; *Wilson v. Heaton*, 11 Beav. 492; *Miles v. Harrison*, 9 L.R. Ch. App. 316, *Alsop v. Bell*, 24 Beav. 451; *Sharp v. Lush*, 10 Ch. D. 468. H

(4) Settlor not beneficially interested—Right of trustee to proceed against him personally for recovering expenses.

Where the trustee acts at the instance of the maker of the trust, at any rate where the maker of the trust is not also beneficially interested under the trust instrument, the trustee has no right to personal indemnity from him, but must look exclusively to the trust funds to make good his expenses or losses. *Fraser v. Murdoch*, 6 App. Ca. 855. I

(5) Beneficiary personally liable to indemnify trustee.

The right of the trustee to indemnity from the *cestui que trust*, who is *sui juris*, is not always limited to the trust-property, it extends further and imposes upon the *cestui que trust* a personal obligation enforceable in equity to indemnify his trustee. *Hardoon v. Bellhos*, A.C. 118 (1901). (See Lewin, p. 782 and Underhill, p. 355). J

(6) Personal liability of beneficiary—Conditions

The expenses must have been inevitable or incurred at the request of the beneficiaries. *Collison v. Lister*, 20 Beav. 368. K

(7) Suit for recovering expenses incurred by trustee—Mode of framing.

See 5 C.W.N. 273. L

7.—“Right to be recouped .. overpayment.”

Overpayment to the beneficiary.

Where a beneficiary has been overpaid by the trustee, the former may be compelled to recoup the latter out of his interest in the trust estate. *Livesey v. Livesey*, 3 Russ. 287, see *Dibbs v. Goren*, 11 Beav. 483; and *Griffiths v. Porter*, 25 Beav. 236. (See Lewin, p. 407 and Underhill, p. 417). M

33. A person other than a trustee who has gained an advantage

Right to indemnity from gainer by breach of trust.

from a breach of trust must indemnify the trustee to the extent of the amount actually received by such person under the breach¹, and, where he is a beneficiary, the trustee has a charge on his interest for such amount².

Nothing in this section shall be deemed to entitle a trustee to be indemnified who has, in committing the breach of trust, been guilty of fraud.

(Notes).

1.—“A person....under the breach.”

Liability of gainer by breach of trust.

As between the trustees and a third person, who has reaped the benefit of the breach of trust, though the trustee must make disbursement in the first instance to the injured party, the loss will eventually be cast on

1.—“A person....under the breach”.—(Concluded).

the person who was the gainer by the breach of trust. *Trafford v. Bochm*, 3 Atk. 440; *Booth v. Booth*, 1 Beav. 580, *Lincoln v. Wright*, 4 Beav. 432; *Lord Montfort v. Lord Cadogan*, 17 Ves. 485; 19 Ves. 635; *Tickner v. Old*, L.R. 18 Eq. 422; *Mozham v. Grant*, 1 Q.B. 88; *Towers v. African Tug Co.*, (1904), 1 Ch. 558. See Underhill, p. 411. N

2.—“Where he....such amount.”

(1) Beneficiary merely instigating the breach, not liable.

The mere fact that the breach of trust was committed at the instigation of a beneficiary, without himself deriving any benefit, cannot render him liable to personally recoup the trustee. *Raby v. Radehalk*, 7 De(f.M. and J. 108. O

(2) *Cestui que trust* gaining advantage of breach.

(a) If the person, who has had the advantage of the breach of trust, be the beneficiary himself the trustee will have a charge on the interest of such beneficiary, to the extent of the amount which he has gained by such breach. *Cruikton v. Cruikton*, 2 Ch. 853. P

(b) Where a person having an interest in the trust has been a party to the breach thereof, whatever is due to him under the trust deed should not be paid over to him, till the recoupment of the loss to the trust-estate. *Lincoln v. Wright*, 4 Beav. 427 (432). Q

(c) Where the *cestui que trust* has joined in the breach, all the benefit that would have accrued to him, either directly or derivatively, either from the trust fund, or any other estate comprised in the same settlement, may be stopped and impounded to compensate the trustee. *Jacobs v. Rylandce*, L.R. 17 Eq. 341; *Dowling v. Dowling*, L.R. 42 Ch. D 203; *Fuller v. Knight*, 6 Beav. 205 R

(3) *Cestui que trust* committing breach also a trustee—Liability to indemnity.

Where the beneficiary, who is party to a breach, is also a trustee, the whole of his beneficial interest, whether acquired before or after the breach of trust was committed, must, as between himself and his co-trustee who is *in pari delicto*, be applied in making good the loss; this would be so, where such trustee and beneficiary has as between himself and his co-trustee, derived an exclusive benefit from the breach of trust. *Chellinworth v. Chambers*, (1896), 1 Ch. 685. See Underhill, p. 406. S

(4) Beneficiary—Trustee—Liability to indemnify.

See S. 45 of the Trustee Act of 1893. T

5) Partial beneficiary joining in breach—His liability.

The equitable interest of a partial beneficiary, who has made himself liable by joining in a breach of trust, may be stopped at the instance of his co-beneficiaries, until the whole loss to the estate has been made good. *Akerman v. Akerman*, (1891), 3 Ch. 212, *Lincoln v. Wright*, 4 Beav. 427 (432). U

6) Beneficiary's liability—What should be proved.

There must be complicity on the part of the *cestui que trust* in a breach of trust, to make him liable. The *cestui que trust* must instigate, or request, or consent in writing to some act or omission, which is itself

2.—“Where he....such amount”—(Concluded).

a breach of trust, and not some act or omission, which only becomes a breach of trust by reason of want of care on the part of the trustees. The *cestui que trust* must know the facts which constitute the breach of trust. *Re Somerset*, (1894), 1 Ch. (C.A.) 231. Y

(7) Breach—Beneficiary's liability—Complicity.

(a) The *cestui que trust* is not responsible for a breach of trust, simply because he had constructive notice of it. His complicity in the breach must be actual and not constructive only. *Mara v. Browne*, (1895) 2 Ch. 69 and 93; *Bolton v. Curre* (1895), 1 Ch. 544. W

- (b) Where a tenant for life undeniably requested trustees to invest the trust-fund on a certain security, but it did not appear that he intended to be a party to a breach of trust, and in effect he left it to the trustees to determine whether the security was a proper one for the sum to be advanced, it was held that the trustees could not impound his life interest to make good the breach. *Mara v. Browne*, (1895) 2 Ch. 69. X

(8) Breach of trust by beneficiary—Right of trustee to impound the beneficial interest—Extent of.

(a) The right of a trustee to impound the interest of beneficiaries who have instigated a breach applies only for the purpose of indemnifying him against the claims of other beneficiaries. It does not extend to indemnify him against other losses. *Evans v. Benyon*, 37 Ch. D. 329. Y

(b) So, where a trustee became entitled to share in the trust fund as one of the next-of-kin of a beneficiary, it was held that he could not call on a beneficiary, at whose instigation the breach was committed, to indemnify him against loss as such next-of-kin, even although the beneficiary had given him an express covenant of indemnity. (*Ibid.*) Z

34. Any trustee² may, without instituting a suit, apply by

Right to apply to Court for opinion in management of trust-property 1.

petition to a principal Civil Court of Original jurisdiction³ for its opinion, advice or direction⁴ on any present questions respecting the management or administration of the trust-property, other than questions of detail, difficulty, or importance, not proper in the opinion of the Court for summary disposal⁵.

A copy of such petition shall be served⁶ upon, and the hearing thereof may be attended by, such of the persons interested in the application as the Court thinks fit⁷.

The trustee stating in good faith the facts in such petition, and acting upon the opinion, advice, or direction given by the Court, shall be deemed, so far as regards his own responsibility, to have discharged his duties as such trustee in the subject-matter of the application.

The costs of every application under this section shall be in the discretion of the Court⁸ to which it is made.

(Notes).

General.

(1) Section same as 22 and 23 Vic, Ch. 35, S. 30.

Notwithstanding the difference in their phraseology, S. 34 of the Indian Trusts Act is substantially the same as 22 and 23 Vic., Ch. 35, S. 30. 18 M. 443 (448). A

(2) Insertion of some expression in section.

The words "other than questions....summary disposal" have been inserted in the end of the first paragraph of the section, with reference to the decisions upon S. 30 of the English Statute referred to by Mr. Stokes in note 3, p. 854, Vol. I of the Anglo-Indian Codes. 18 M. 443 (449). B

1.—"Right to apply to Court....trust property."

(1) Provisions under English law—Analogous to section.

Under 22 and 23 Vic., Ch. 35, S. 30, any Judge may offer his opinion or direction respecting the management or administration of the trust property, on the application of the trustee. C

(2) Repairs by trustees—Opinion of Court.

The trustees of a settlement having power to purchase lands, on being requested by tenants for life, desired the opinion of the Court as to the propriety of applying £1,200 in repairs and permanent improvements. Held that that was not a case in which the Court could properly give an opinion under 22 and 23 Vic, Ch. 35, S. 30. *Re Barrington's Settlement*, 1 J. and H. 142, 143. D

(3) Expenditure of moneys—Court's sanction.

(a) Cases would arise in which the Court would sanction the expenditure of moneys by a tenant for life for the benefit of the inheritance, by making such expenditure a charge upon the inheritance. *Coldecott v. Brown*, 2 Hare 141, 145, 146. E

(b) So, where there is a devise of lands in strict settlement, and a direction to lay out personal estate to the same uses, it might be more beneficial to the remainderman that a part of the trust fund should be applied to prevent buildings on the settled estate from going to destruction, than that the whole should be laid out in the purchase of other lands. (*Ibid*) F

(4) Permanent improvements—Repairs—Sanction of Court.

(a) There can be no difficulty about laying out a portion of the fund, under the sanction of the Court, in permanent and substantial improvements. The Court would readily accord sanction to the trustees, on an application being made by them for the same. *Re Barrington's Settlement*, 1 J. and H. 142, *Coldecott v. Brown*, 2 Hare 144. G

(b) But repairs may require separate consideration. The Court would hesitate to accord sanction. (*Ibid*) H

(5) Special powers of trustees—Repairs—Court's sanction.

Although special powers have been given to trustees authorising them to make investments in land or buildings, the Court cannot, on application

1.—“**Right to apply to Court....trust property**”—(Concluded).

being made by the trustees for it, give sanction to repairs being executed in respect of existing buildings. *In re Nether Stowey Vicarage*, L.R. 17 Eq. 156; *Brunskill v. Cawd*, L.R. 16 Eq., 493; *contra. Re Pearson*, 21 W.R. 401; *In re Lord Hotham's Trusts*, L.R. 12 Eq. 76. * I

(6) **Executor—Whether entitled to benefit of section.**

Where an executor applied under S. 34, Trusts Act, with regard to the administration of the trust property of the testator, *held*, dismissing the application, that an executor, as such, cannot become a trustee so as to incur all the liabilities of a trustee. So long as he occupied that position, he cannot claim the advantages provided for trustees by S. 34, Trusts Act. 33 B. 429; see Snell's Equity, pp. 165 and 169 (12th Ed.) J

2.—“**Any trustee.**”

Public charitable trust—Constructive trust—Whether section applies to.

Where, by a deed of trust, X appointed the Collector, the Chaplain, and the officer commanding the troops, trustees to administer property bequeathed by him in charity, and the officers holding the said appointments applied under S. 34 Trusts Act, for permission, to sell and convert the immoveable property into cash, and invest the same in securities recognised by the Trusts Act, *held*, that none but legally recognised persons could be appointed trustees, and the officers mentioned in the trust-deed not being corporations sole, the legal effect of appointing them trustees was to appoint the gentlemen holding the offices at the time the deed came into effect. The gentlemen holding the office could at most be treated as constructive trustees to whom S. 34 is inapplicable. *Held*, further that the trust being a public charitable trust is excluded from the operation of the Indian Trusts Act. 1 S.L.R. 218. K

3.—“**Apply by....original jurisdiction.**”

(1) **Object of the provision.**

The provision for the trustees taking the advice of Court, on petition, has been intended to enable them to get such advice upon doubtful points of minor importance, and not on important points of difficulty or points of law. *Re Speller*, 6 Jur. N.S. 386; and *Re Mackel's Will*, 1 Jobs. 625. L

(2) **Petition how to be made.**

No affidavits are required to be presented with the petition. The correctness of the petition is assumed, and facts are not investigated upon. The petition has to be signed by counsel. *Dennis*, 5 J. (N.S.) 1388. M

(3) **Procedure by trustee in cases of doubts.**

In cases of any doubts, the trustee may refuse to act without the sanction of the Court, and the costs of making a petition to the Court in relation to the points of doubt will have to be allowed to the trustee. *Re Wyll's Trust*, 28 Beav. 458. (Lewin, p. 418). N

(4) **Caution by Courts in according sanction.**

Vigilance on the part of the Court is necessary to prevent applications for sanction, for which there are not, in the opinion of the Court, adequate grounds. *In re De Teissures Settled Estates*, 1893, 1 Ch. 153 (16t). O

3.—“Apply by....original jurisdiction”—(Concluded).

(5) Repairs—Trustees soliciting sanction for—Direction by Court.

Where the trustees applied to the Court for sanction to execute certain repairs on the trust estate, the Court, in the exercise of the discretion vested in them, directed an enquiry as to what repairs were necessary to the trust property. *In re Jackson*, 21 Ch. D. 786. **P**

(6) Repairs—Trustees soliciting sanction—Sanction by Court under what circumstances.

Where trustees apply to the Court for sanction allowing them to execute repairs to the trust property, the Court, on being satisfied of its necessity, could allow only such repairs as may be found to be really and clearly necessary to prevent the buildings in question from becoming so dilapidated as to be unfit for the purposes in connection with the administration of the trust. *Ex parte Vicar of St. Botolph Aldgate*, (1894), 3 Ch. 544. **Q**

(7) Executor cannot refer—his remedy.

An executor cannot refer to Court, and thus claim the advantages provided by S. 34, Trusts Act. His remedy, if he feels any doubt as to the manner in which he should administer the estate under his control, is to file an administration suit. 11 Bom. L.R. 495=33 B. 429. **R**

(8) Opinion given by Court under section—Appeal, if lies.

No appeal lies from an opinion expressed by the Court under this section. 33 B. 429=11 Bom. L.R. 495. **S**

(9) Appeals—English law.

(a) As a trustee is indemnified by the decree of the Court, he may appeal from any decision to the Court above, at his own risk. *Howland v. Morgan*, 13 Jur. 23; *Wellesley v. Morrongton*, W.N. 1870, p. 192. **T**

(b) If the rights be perfectly clear and the trustee appeals to the Court without reason, he will be answerable in costs, though he does not act either fraudulently or maliciously. *Re Knight's Trust*, 27 Beav. 45. *Lowson v. Copeland*, 2 B.C.C. 156. **U**

4.—“For its opinion, advice or direction.”

(1) English law—Lord St. Leonard's Act.

Under Lord St. Leonard's Act, the Court has power to give advice to trustees, relating to investments, compromises, and the maintenance and advancement of infant cestui que trust, 22 and 23 Vic. C. 35, S. 30. **V**

(2) Married woman—Trustee taking advice of Court.

Where a married woman, being of unsound mind, was entitled for her separate use to the income of certain funds, and where her written consent was also got to the investments by the trustees, held, upon petition by the trustees, that this was a case in which the trustees could properly take the advice of the Court. 22 and 23 Vic. C. 35, S. 30. **W**

(3) When trustees must take sanction—Reasons.

A trustee cannot be expected to incur the least risk, and therefore, if the equities be not perfectly clear, he should decline to act without the sanction of Court. *Re Wyllie's Trust*, 28 Beav. 458. **X**

4.—“*For its opinion, advice or direction*”—(Concluded).

(4) **Court when not bound to give opinion.**

The Court will not express opinion, if the question is not a present one, but is future or contingent. *Re Mackel's Will*, 1 Jobs. 625. Y

(5) **When Court would interfere**

The Court would interfere to advise trustees in respect of the investment of trust funds, payment of debts, or whether calls on shares in companies should be borne by the testator's general estate or the legatees. *Re box*, 1 Henn. and M. 552. Z

5.—“*Other than questions of detail... summary disposal.*”

(1) **Court cannot direct the trustees on questions of detail.**

- • (a) If any case, about which the trustees solicit the opinion of the Court, goes into details, with which the Court cannot effectually deal without having a superintending power and being informed by affidavits, then the Court has no means of exercising any controlling power over the subject-matter. *Re Barrington's Settlement*, 1 J. and H. 142, 143. A
- (b) Points of doubt, the decision as to which might affect the rights of the parties, cannot be decided by the Court summarily on petition by trustees. *Lorenze's Settlement*, 11 Drew. and Sm. 401. B

(2) **Application for directions by trustees—Questions of detail and difficulty.**

The management of the Doveson charities was vested in a committee of management, who were empowered under the trust-deed to require the trustees of the funds of the charities to invest the trust funds in excess of two lakhs of rupees in the purchase of any additional land, building and premises. Certain buildings, having been erected under the provisions of the trust deed, were in urgent want of repairs. The current income of the charities was not sufficient to meet the cost of carrying out the repairs, and the committee of management and the trustees were agreed that a sum of Rs. 8,700 in the hands of the latter (in excess of two lakhs of rupees) should be employed in carrying out this work. The trustees applied to the High Court for its opinion on the question whether this should be done. *Held* that the question, being one of detail and difficulty, is such as the Court could not deal with under S. 34 of this Act. 28 M. 443. C

(3) **Questions of detail and difficulty—Procedure to be followed by trustees.**

The proper course for the trustees for obtaining sanction, as regards questions of detail and difficulty concerning the trust estate, is to institute a regular suit in its original jurisdiction. 28 M. 443 (450); see, also, *In re Barrington Settlement*, 1 J. and H. 142. D

(4) **Court's jurisdiction over such matters.**

- (a) The Court, in the exercise of its original civil jurisdiction, is empowered to deal with cases, in which the trustees institute suits praying for sanction in respect of questions of detail and difficulty concerning the administration of the trust. 28 M. 443; *Conway v. Feuton*, 40 Ch. D. 512. E

5.—“Other than questions of detail....summary disposal”—(Concluded).*

(b) So, where land and money were vested in the trustees of the settlement, for the benefit of the husband and wife for themselves, and, after their deaths, for their children, and where the buildings on a farm land were so much out of repair as to make the farm untenable, held that the Court had power, under its original jurisdiction, to sanction the expenditure of a part of the money in repairing the land buildings. *Conway v. Feuton*, 40 Ch. D. 512. **F**

(c) If it is shown that it is judicious to make repairs, and the trustees come to Court for authority to make them, that authority will be given. *re Hotchkys*, 32 Ch. D. 408, 420. **G**

6.—“A copy of such....served.”

(1) Right of trustees to take out summons.

(a) Trustees may, in cases of doubt as to what course they ought to adopt, safeguard themselves by taking out an originating summons for determination of questions affecting the trust estate. See *Underhill*, p. 360. **H**

(b) So, where new trustees refused to act until it was determined whether the old ones were liable for a loss, the Court on summons declared that the old ones were not liable. *Barton v. Inzun*, W.N. (1895), 23. **I**

(2) Summons how taken out—English law.

The originating summons is taken out returnable in the chambers of a Judge of the Chancery division for the determination of questions affecting the rights of the beneficiaries. **J**

7.—“The hearing ...fit.”

(1) Powers of Judges.

The Judges have power on such summons to make declarations binding the parties. *Re Beherens*, W.N. (1888), p. 95. **K**

(2) Persons to be served—Court's discretion.

The persons to be served with a copy of the petition, under this section, must be determined by the Court at its discretion. *In re Green's Trust*, 6 J. (N.S.) 386. **L**

8. — “The costs of....Court.”

(1) Generally costs to be charged on trust estate.

As a general rule, if the application is made in good faith and the facts are correctly stated, the costs will come out of the trust funds. 18 M. 443. **M**

(2) Costs of petition—Trustee's right to.

Where the trustee moves the Court, through a petition, for obtaining the sanction of the Court in respect of the management of the trust, he will be allowed all costs and expenses incurred by him in connection therewith. *Talbot v. Earl of Radnor*, 9 M. and K. 252; *Goodson v. Ellison*, 3 Russ. 583. **N**

35. When the duties of a trustee, as such, are completed, he is entitled to have the accounts of his administration of the trust-property examined and settled¹; and, where nothing is due to the beneficiary under the trust, to an acknowledgment in writing to that effect².

Right to settle-
ment of accounts.

(Notes).

1.—“ When the....completed....settled.”

(1) Settlement of accounts on completion of trust business.

(a) Where the trust business has been completed, a final adjustment of the trust account is made, in order to enable the trustee to hand over the balance, if any, to the parties entitled. *Osborne*, 6 Ves. 455. Underhill, p. 358. **O**

(b) Upon the completion of the trust, a trustee is entitled to have his accounts examined and settled by the beneficiaries. *Re Lord Stamford Ryne v. Stamford* (1896), 1 Ch. p. 301. Tagore Law Lectures, p. 219. **P**

(2) Settlement of accounts—Trustee's liability.

The trustee is bound to give accounts if demanded, or to have the accounts wound up. If the party to receive, is satisfied upon the account sent in, he ought to close the account. On the other hand, if the *cestui que trust* is dissatisfied with the accounts, he ought to require to have the accounts taken. The trustee need not keep an action for an account hanging for an indefinite time over his head. 2 Spence 46 **Q**

(3) Accounts settled—Effect of.

Generally, settled accounts are not opened (*i.e.*) taken over again throughout. But where one clear omission or wrong insertion is proved, the beneficiary will be at liberty to “ surcharge the omission and falsify the insertion ” together with all other erroneous omissions and insertions. This is technically called “ liberty to surcharge and falsify ” (*i.e.*) give credit for an item not credited and take off the item wrongly debited. This is done, even though the error has not found a place in the accounts out of fraud. *Williamson v Barber*, 9 Ch D. 529; *Blagrove v. Routh*, F. and J. 509. **R**

(4) Discharge of trustee—Court's order as to payment of amount by new trustee to old—Account by old trustee—Suit for receiving amount ordered.

Where, at the time of discharging a trustee, the Court ordered the new trustees to pay a certain amount to the discharged trustee as a first charge upon the trust estate, and, such new trustee having refused to pay the amount until the discharged trustee gave an account of his management, an action was brought to recover the amount, held that the suit was maintainable. 11 M.L.J. 188. **S**

2.—“ Where nothing....writing to that effect.”

(1) Acknowledgment of settlement of all demands—Reason.

(a) The trustees may require from the *cestui que trust* an acknowledgment that all claims and demands have been settled. *Osborne*, 6 Ves. 455. **T**

(b) It is reasonable that, when the trustee parts with the whole fund, and so denudes himself of the means of defence, he should be placed, by the party receiving the benefit, on the utmost security against future litigation. *Osborne*, 6 Ves. 455. **U**

2.—“Where nothing...writing to that effect”—(Continued).

(2) Receipt to be in respect of existing claims.

The receipt given by the beneficiary in full of all claims extends only to all claims that are known. *Mares v. Hickson*, 30 Beav. 142. **Y**

(3) Settlement of accounts—Trustee not, in general, entitled to release.

In practice, it is usual to require a release under seal, so that the trustee may free himself from all liabilities to the *cestui que trust*. But in strict right, a trustee, in the absence of special circumstances, cannot insist upon a release under seal; he can have only an acknowledgment in writing that nothing is due by him to the trust. *Fowler v. Vyatt*, 24 Beav. 232; *Chadwick v. Healty*, 2 Coll. 137; *Re Wrights' Trust*, 3 K. and J. 421. **W**

(4) Express trust—Release under seal.

In the case of an express trust—when the trust is apparent on the face of the deed, the fund clear, the trust clearly defined, and the trustee is paying either the income or the capital of the fund, if he is paying in strict accordance with the trusts, he has no right to require a release under seal. *Fing v. Mullins*, 1 Drew. 311. **X**

(5) Trust by parol—What kind of acknowledgment necessary—Release.

(a) RELEASE NECESSARY—WHEN.

Where the trust is parol, it is necessary that a release under seal should be executed by the *cestui que trust*, in order to safeguard the trustee. *Fing v. Mullins*, 1 Drew. 303. **Y**

(b) RELEASE NOT NECESSARY—WHEN.

But, in another case, it was held that the circumstance that the trust was by parol, and therefore obscure, might have been an excuse for not paying at all, or ground for demanding an indemnity, but seems to afford no reason for requiring a release under seal, as distinguished from a simple receipt or acquittance in writing. *Anson v. Potter*, 13 Ch. D. 141. **Z**

(c) RELEASE NECESSARY WHEN TRUST CREATED BY INSTRUMENT UNDER SEAL.

Every trustee has a right to have some sort of a discharge, perhaps not release, unless the trust was created by an instrument under seal. *Re Cater's Trusts*, 25 Beav. 366. **A**

Release—Executor's right to.

“An executor has a right to be clearly discharged, and not to be left in a position in which he may be exposed to further litigation; therefore, he fairly says, ‘unless you give me a discharge on the face of it protecting me, I cannot safely hand over the fund,’ and therefore it is usual to give a release.” *King v. Mullins*, 1 Drew. 311. **B**

(7) Release in exceptional cases.

(a) RE-SETTLEMENT OF TRUST PROPERTY.

Where trust moneys have been re-settled, the trustees, or executors of the original settlement or will, are entitled to a release under seal from their beneficiaries, though they are entitled only to a mere receipt from the trustees to whom they pay the moneys. *Re Cater*, 25 Beav. 366. **C**

2.—“Where nothing . . . writing to that effect”--(Concluded).

(b) POWER OF APPOINTMENT—EXERCISE OF.

But, where a person, having a general power of appointment by will, appoints the fund in pursuance of the power and appoints executors, the trustees of the fund can safely hand it over to executors on their receipt, and cannot demand a release under seal from the beneficiaries; for, by appointing, the donee of the power makes the property assets of his own. *Re Hoskin*, 5 Ch. D. 229. D

(8) Reason for demanding the release.

- The trustee is entitled to have a formal discharge given to him by the beneficiary, because he and his family should be delivered from the anxiety and misery attending unsettled accounts. *Cadwick v. Heatley*, 2 Coll. 137. E

(9) Expense of the release.

The trustee having the necessary documents in his possession, the solicitor of the trustee will draw the release deed. The expense must be paid out of the trust fund. Lewin, p. 412 (11th Ed.). F

36. In addition to the powers expressly conferred by this Act and by the instrument of trust², and subject to the restrictions (if any) contained in such instrument, and to the provisions of section 17³, a trustee may do all acts⁴ which are reasonable and proper⁵ for the realization, protection, or benefit of the trust-property⁶ and for the protection or support of a beneficiary who is not competent to contract⁷.

Except with the permission of a principal Civil Court of original jurisdiction⁸, no trustee shall lease trust-property for a term exceeding twenty-one years from the date of executing the lease, nor without reserving the best yearly rent that can be reasonably obtained⁹.

(Notes).

1.—“General authority of trustee.”

(1) Powers of trustees—Two kinds.

- The powers of the trustees are either general or special; the former, such as, by construction of law, are incident to the office of trustee *virtute officii*; the latter, such as are conferred *vi terminorem* (i.e.) by the settlor himself by an express proviso in the instrument creating the trust. Lewin, p. 693 (11th Ed.). G

(2) Powers of trustees at Law and Equity.

At Law, the trustee, being the owner of the legal estate and as such being the absolute proprietor, may exercise all such powers as the legal ownership confers. But in Equity, the *cestui que trust* is the absolute owner, and so the trustee could exercise all those powers which would not render him responsible in the *forum* of a Court of Equity. (*Ibid.*) H

1.—“General authority of trustee”—(Concluded).

(3) Simple trusts—Powers of trustees

In simple trusts, the trustee is simply a depository, and, consequently, he cannot take any part of the profits, nor can he exercise any control over the *corpus*. But he could do so at request of the beneficiary. Lewin, p. 693 (11th Ed.)

(4) Special trust—Trustee's powers.

(a) GENERAL RULE.

As a rule, in special trusts, the powers of the trustees are similarly limited, except so far as the execution of the trust gives him a proprietary power. Lewin, p. 693 (11th Ed.)

(b) EXCEPTIONS—REASONS.

(i) Under particular circumstances, the trustee could exercise the discretionary powers of the *bona fide* proprietor, for, if otherwise, the trust estate might be injuriously affected. *Angell v. Dawson*, 3 Y. and C. 317; *Harrison v. Randall*, 9 Hare 407, *Foreshaw v. Hugginson*, 3 DeG.M. and G. 827.

(ii) The necessity of the moment may demand immediate action, while the sanction of the parties who are beneficially interested could not be procured without great inconvenience (as where the *cestui que trust* is a numerous class), or perhaps could not be obtained at all (as where the *cestui que trust* are under disability, or not yet in existence). It is, therefore, evidently in furtherance of the *cestui qui trust*'s own interest, that, where the circumstances of the case require it, the trustee should be at liberty to exercise a reasonable discretionary power. *Darks v. Williamson*, 25 Beav. 622; *Ward v. Ward*, 2 H.L.Cas. 784.

(5) Trustee for adults—Powers.

(a) A trustee for adults cannot take any proceeding without consulting his *cestui que trust*. *Bradley v. Witchurch*, W.N. (1868), 81.

(b) If he do so, and the proceeding is not approved of by them, he may have to pay the costs. (*Ibid.*)

(6) Trust not definite—Notice to *cestui que trust*—Trustee's liability.

Where the trust is not definite and precise, and it is doubtful what ought to be done under the trust, the trustee may give notice to the beneficiary of his intention to do a particular act, and unless the beneficiary interferes to stop it, the trustee will not be held liable for doing the act. *Life Association of Scotland v. Siddal*, 3 DeG.F. and J. 74—*Per L. J. Turner*.

2.—“Powers . . . by instrument of trust.”

(1) Exercise of powers under settlement.

A trustee may exercise all powers expressly confided to him by the settlement. *Austin v. Austin*, 4 Ch. D. 233, *Gisborne v. Gisborne*, 2 A.C. 300

(2) Special powers of trustee—Division of powers.

(i) BARE POWERS AND POWERS COUPLED WITH A TRUST.

The former are not imperative but purely arbitrary (i.e.) powers which the trustee cannot be compelled to execute. The latter are not arbitrary but imperative and have all the nature and substance of trust. *Godolphien v. Godolphien*, 1 Ves. 23.

2.—“Powers....by instrument of trust”—(Continued).

(ii) STRICT POWERS AND POWERS DIRECTORY.

The former are such as arise only under the circumstances proscribed by the settlement. The latter are such as may be taken by the trustee with a degree of latitude. *Attorney-General v. Scott*, 1 Ves. 413. **R**

(3) Powers joint.

Powers given to trustees must be exercised by them jointly, but an act by one trustee, with the sanction and approval of a co-trustee, will be deemed the act of both. *Messena v. Garr*, L.R. 9 Eq. 260. **S**

(4) Powers how to be exercised

(a) In the exercise of their powers, the trustees must act *bona fide* and impartially for the benefit of their *cestui que trust*. *Ellis v. Barker*, 7 L.R. Ch. App. 104. **T**

(b) Every act of a trustee in exercise of his powers must be such as he could have obtained the permission of the Court for the same, if such permission had been previously sought for. *Seagram v. Knight*, 2 Ch. A. 690. **U**

(5) Power conferred on trustee, when passes with the estate.

“The power (conferred on a trustee) is not appendant to the estate, so as to follow along with it in every transfer by the trustee, or devolution by course of law. But where the estate is duly transferred to persons regularly appointed trustees under a power in the settlement creating the trust, the transferees take the estate and the office together, and can exercise the power. (*Cole v. Wade*, 16 Ves. 47.” *Lewin*, 11th Ed., p. 742 **Y**

(6) Powers—Disclaimer by one trustee—Effect.

If a power be given to several trustees and one of them disclaims the trust, the power may be exercised by the continuing trustees or trustee. *Crene v. Dixon*, 4 Ves. 97. **W**

(7) Assignment—Effect of, on powers.

(a) The power is not appendant to the estate. So an assignment will not carry the power to the assignee. *Cole v. Wade*, 16 Ves. 27, see same case, *supra*. **X**

(b) But where it was the settlor's intention that the estate and power should be coupled together, it will not remain in the assignor. *Lewin*, pp. 741, 742. **Y**

(8) Survivorship of powers.

(a) The survivorship of the estate carries with it the survivorship of such powers as are annexed to the trust. *Lowe v. Debenham*, 1 Harc 188. **Z**

(b) The principle that trust powers survive with the estate is as old as the time of Lord Coke. *Coke*, Litt. 113-a. **A**

(9) Trustee need not give reasons for exercise of power.

The trustees need not assign reasons for the way in which they exercise their powers. But if they state their reasons, the Court could set aside their conclusions if come to on false premises. *King v. Archbishop of Canterbury*, 15 East 117. **B**

2.—“Powers....by instrument of trust”—(Concluded).

(10) Exercise of special power after decree.

After a decree is passed, the trustee cannot exercise even a special power without previously obtaining the Court's sanction. *Bethell v. Abraham*, L.R. 17 Eq. 24. C

3.—“Subject to the....section 17.”

Impartiality of trustee.

(a) The trustee must act honestly and must not benefit one beneficiary at the expense of another. *Smith v. Thompson*, (1896) 1 Ch. 71, *Wood v. Patten*, 10 Beav. 541. D

(b) A trustee must always act impartially and avoid securing additional advantage to one of his beneficiaries at the expense of the others. *Wood v. Patten*, 10 Beav. 544. • • E

4.—“A trustee may do all acts.”

(1) Powers of executors.

(a) TIME FOR ADMINISTRATION.

An executor is generally allowed two months time to break up the testator's establishment. *Fidd v. Peckett*, 29 Beav. 568. F

(b) EXECUTOR MAY CARRY ON TRADE OF TESTATOR.

He may carry on the trade of the testator for such time as is necessary to enable him to sell it as a going concern. *Dowse v. Gorton* (1891) A.C. 190. G

(2) Executor's costs—Lien

He is entitled to a lien, for his costs and expenses, on the trust estate. *Jennings v. Mather*, (1902) 1 K.R. 1. H

(3) Executor's right to indemnity.

An executor is entitled to be indemnified, out of the estate, for loss which he may sustain. *Dowse v. Gorton*, (1891) A.C. 190, *Re Brooke*, (1894) 2 Ch. 600. I

(4) Executor's right to pay time-barred debts.

(a) An executor can pay a debt owing from the testator's estate, which has been barred by the Statute of Limitation. *Lewis v. Runney*, L.R. 4 Eq. 451; *Mudgley v. Mudgley*, (1893) 3 Ch. 282; *Trevelyan v. Hutcheson*, (1896) 1 Ch. (C.A.) 844. J

(b) Similarly he may retain his own debt though barred. *Dring v. Greetham*, 1 Eq. 442; *Louis v. Runney*, 4 L.R. Eq. 451. K

(c) But an executor cannot pay such a debt after a decree for the administration of the testator's estate, for, from that time, the Statute of Limitations may be pleaded in taking the accounts. *Fuller v. Redman*, 26 Beav. 614. L

(5) Executor's right to pay subscriptions promised by testator.

(a) Where the deceased has made some promise to subscribe a certain sum for the promotion of some charitable or public purpose, if nothing has

4.—“A trustee may do all acts”—(Continued).

been done in pursuance of the promise, the promise must be treated by the executor as merely voluntary and therefore null and void. *Re Hudson*, 33 W.R. 819. **M**

- (b) So, where a testator promised to give £ 20,000 to an Union in five annual instalments, and having paid three instalments, died, leaving the remaining instalments unpaid and unprovided for, and the Union had incurred liabilities in consequence of the promise, it was held that there was no enforceable contract. (*Ibid.*) **N**

(6) Discretion of executor.

- (a) Executors have a discretion whether they will press a debtor for payment, and they will not be held liable for wilful neglect or default, if they have exercised their discretion honestly and fairly in giving time to a debtor, although loss may result from the delay. *Re Owens*, 47 L.J.N.S. 61. **O**
- (b) It is competent to an executor to compromise the claim of another co-executor against the estate. It is better he takes the Court's directions in such matters. *Re Houghton*, (1904) 1 Ch. 622. **P**

(7) Appropriation of legacy by executor.

An executor may appropriate a legacy without instituting a suit, where the appropriation is such as the Court itself would have directed. *Hutchison v. Hammond*, 3 B.C. C. 128. **Q**

(8) Effect of appropriation.

Where an appropriation has been validly made, it will be binding on the beneficiaries, who will be entitled to share in any increment in value, and they should also bear any loss arising from depreciation of the investments of the severed fund. *Fraser v. Murdoch*, 6 A.C. 855. **R**

(9) Effect of decree in administration suit on duties of executor.

The mere fact of a decree having been passed in an administration suit cannot be regarded as having absolved the executor from the duties of his office. *Garner v. Moore*, 3 Drew. 277. (Lewin, p. 731). **S**

(10) Extent of trustee's liability for his agent's acts.

- (a) The rule that trustees, acting according to the ordinary course of business and employing agents as prudent men of business will do on their own behalf, are not answerable for the default of the agent so employed, is subject to the limitation that the agent must not have been employed out of the course of his own business *Fry v. Japson*, 28 Ch. D. 268. **T**

- (b) Where trust money collected by the properly appointed agent of a trustee is lost owing to the agent's insolvency, the onus is upon the person charging the trustee, to prove default on the part of the trustee. *Brier v. Brier*, 26 Ch.D. 243. **U**

(11) Necessity for joint action.

(a) PRIVATE TRUST.

- The general powers allowed to trustees must, in a private trust, be exercised by all the trustees as a joint body. *Re Ekeworth and Tidy's Contract*, L.R. 42 Ch. D. 28. **Y**

4.—“A trustee may do all acts”—(Continued).

(b) PUBLIC TRUST.

In charitable or public trusts, the voice of the majority will bind the rest, and, in certain cases, the majority can give effect to their resolution by passing the legal estate under a statutory power. (*Ibid.*) W

(12) When powers of trustees may be exercised after decree.

After a suit has been instituted and a decree made, the powers of the trustees cannot be exercised, and the authority of the Court must sanction every subsequent proceeding. *Matchelson v. Peper*, 8 Sim. 64; *Munors v. Battison*, L.R. 1 A.C. 428. X

(13) Trustee liable even after the passing of decree.

(a) Even after the passing of the decree, the trustee is not absolved from the duties imposed by his office. *Garner v. Moore*, 3 Drew. 277. Y

(b) So after a decree in an administration suit, an executor was held liable for having allowed a policy of insurance to drop without any sufficient reason. *Garner v. Moore*, 3 Drew. 277. Z

(14) Trustee's actions—Trustee may dispense with “forms.”

(a) In order to avoid circuity, trustees may do away with forms, the observance of which would entail unnecessary expense and delay. *Messena v. Carr*, L.R. 9 Eq. 260. *Re Mabbett*, (1891) 1 Ch. 707 at 712. A

(b) So, where the transfer of a sum of stock is secured to trustees of a settlement, and they have power by the settlement to sell out the fund and invest on mortgage, they need not insist on a transfer of the stock *in specie* for the purpose of immediately selling out and investing the proceeds on mortgage, but, if they have the mortgage ready, may take the value of the stock, and hand it over to the mortgagor. *Pell v. De Winton*, 2 De G. and J. 20. *George v. George*, 35 Beav. 382. B

(c) Similarly trustees having a power to lay out a certain sum in the purchase of an annuity for X may pay the sum to X direct, without going through the form of purchasing annuity. *Re Ross*, (1900) 1 Ch. 162; *Stokes v. Cheek*, 28 Beav. 620. C

(15) Trust management—Decision of majority is binding on the trustees.

Where a question of trust management has been fairly considered by all the trustees, so that each has the opportunity to let his views be known before a decision is passed, the opinion of the majority is binding on the minority, if it be arrived at in the fair exercise of the discretionary powers committed to them, and if the action of the majority is productive of benefit to the trust estate. 6 M. 270. D

(16) When Court's sanction necessary for trustees' actions.

(a) After the institution of a suit the trustees can exercise their powers only on obtaining the Court's sanction. *Mitchelson v. Piper*, 8 Sim. 64. E

(b) Subsequent to the passing of a decree, even a special power in the trustee cannot be exercised by him without the Court's permission. *Bethell v. Abraham*, L.R. 17 Eq. 24. F

4.—“A trustee may do all acts”—(Concluded).

(17) Trustee of leasehold property, rights and duties of.

“It is the duty of a trustee of leasehold property to keep it free from the risk of forfeiture, and for that purpose, he is entitled to have the covenants in the lease performed out of the rents of the property which come to his hands, and is not bound to be satisfied with an indemnity against the consequences of a breach of the covenants.”
Lewin, 11th Ed., p. 260. F1

5.—“Which are . . . proper.”

(1) Discretionary powers—A typical instance.

A testator devised his real and personal estate to trustees upon various trusts, one of which was that, “my said trustees, in their discretion and of their uncontrollable authority, pay and apply the whole, or such portion only, of the annual income of my real and personal estate as they think expedient, to and for the clothing, board, etc., and for the personal and peculiar benefit and comfort, of my dear wife.” The wife also had property of her own, and was a lunatic, and one of the trustees was the residuary legatee under the testator's will. Under these circumstances, the trustees *bona fide* refused to permit the whole income of the trust fund to be applied for the wife's support in the asylum, and proposed to allow only so much for that purpose as would be sufficient after taking into account the income of the wife's own property. The House of Lords, on these facts, held that the trustees had an absolute discretion in the application of the fund, and that, so long as they exercised that discretion *bona fide*, the Court could not interfere with them. *Tabor v. Brooks*, 10 Ch. D. 273, *Gisborne v. Gisborne*, 2 A.C. 300; *Coles v. Courter*, 34 Ch. D. 136. G

(2) Payment of trust funds—Discretionary powers.

No discretionary powers can be exercised after the trustees have paid the trust fund into the Court. *Re Murphy*, (1900) 1 I.R. 145. H

(3) Absolute discretionary powers—Exercise of—Court's power in respect of.

Where absolute discretion has been given to trustees to do a particular act, the Court cannot compel them to exercise the power; but if they do exercise it, the Court will see that they do exercise it properly and reasonably. *Tempest v. Lord Camoys*, 21 Ch. D. 571; *Re Blake, Jones v. Blake*, 29 Ch. D. 913. I

(4) Discretion sometimes limited to time and manner.

Where the trustees were directed to pay the income of the trust property, at such time and in such manner as the trustees should think fit, towards the maintenance of a lunatic during her life, with power to invest any surplus, not required for the purpose, as capital, the Court of appeal held that the trustees had only a discretion as to the time and manner of the application and nothing more. *Re Weaver*, 21 Ch. D. 615. See *Re Atkins, Newman v. Sinclair*, 81 L.J. 421. J

(5) Powers in the nature of trusts—Distinguished from discretionary power.

(a) True discretionary powers must be distinguished from powers which, though discretionary in form, are really coupled with a duty.
Tempest v. Lord Camoys, 21 Ch. D. 576. K

5.—“ Which are . . . proper ”—(Continued).

(b) So where a testator devises real estate to trustees, in trust to manage them during the minority of an infant, with power to lease in their discretion, the trustees could be compelled to exercise the power of letting. *Ibid*, *Nickisson v. Cockhill*, 3 De G. and J. and S. 622. **L**

(c) “ One cannot understand that, where the machinery for management of the estates is given to the trustees, and the Court undertakes to enforce the trusts for management, it is right for it to compel the trustees to utilize the machinery entrusted to them.” In fact, the Court will look at the substance, rather than the form, and where what appears to be a discretionary power is, in reality, part of a trust for management, the Court will order the trustees to exercise the power. *Nickisson v. Cockhill*, 3 De G. and J. and S. 622. **M**

(6) Exchange of policy for a fully paid-up one.

A trustee may surrender a policy of assurance forming part of the trust property, in exchange for a fully paid-up one of less amount, in cases where the party liable to pay the premiums cannot possibly do so. *Steen v. Peebles*, 25 L.R. Ir. 544. **N**

(7) Power to fell timber.

Where timber on the estate has arrived at maturity and would only degenerate if allowed to stand, and where, for the purpose of thinning it, it is necessary to be cut, the trustee may fell it on his own authority. *Waldo v. Waldo*, 7 Sim. 261. **O**

(8) Power to grant certain leases.

(a) AGRICULTURAL LEASE.

A trustee having the management of property may grant a reasonable agricultural lease. *Attorney-General v. Owen*, 10 Ves. 555; *Naylor v. Arnutt*, 1 R. and M. 501. **P**

(b) MINING LEASE.

The trustee may not grant a mining lease, for that would benefit the tenant for life at the expense of the reversioner. *Wood v. Patteson*, 10 Beav. 541. **Q**

(c) CONSENT OF TENANT-FOR-LIFE NECESSARY.

Under S. 56 of the Settled Land Act (1882), the consent of the tenant for life (where there is one) would be necessary for granting such leases. **R**

(d) BUILDING LEASE.

Under powers to grant building and mining leases, a building lease with reservation of minerals may be granted. *Re Duke of Rutland's Settled Estates* (1900), 2 Ch. 206. **S**

(9) Simple trust—Leases.

The trustee has no power to demise where it is a simple trust and the *cestui que trust* is in possession, unless he does it with the *cestui que trust*'s concurrence. *Attorney-General v. Owen*, 10 Ves. 560. **T**

(10) Trustee for sale—Leases.

Prima facie a trustee for sale cannot grant a demise. *Evans v. Jackson*, 8 Sim. 217. **U**

5.—“Which are . . . proper” —(Concluded).

(11) Trustee cannot lease to himself.

A trustee ought not to create a lease of the trust property in favour of himself, either singly, or jointly with others. *Boyce v. Edbrooke*, 1 Ch. 886. (Lewin, p. 727). Y

(12) Power to mortgage.

Where there is a power in the trustees to make outlays in repairs and improvements out of income or capital, there is an implied authority for the trustees to mortgage the property for the purpose of raising the necessary money out of capital. *Durell v. Bellinger*, (1898), 2 Ch. 534. W

(13) Trustee not to make speculative improvements.

(a) The trustee must not do acts, which, though beneficial to the estate, are unreasonable or problematical. For instance, they cannot make merely ornamental improvements. *Bridge v. Brown*, 2 Y. and C. C. 181. *Attorney-General v. Geary*, 3 Mer. 513. X

(b) Nor can they pull down a mansion-house for the purpose of re-building a better one. *Blezard v. Whalley*, 2 Eq. 1093. Y

(c) Nor can they build a Villa for the improvement of the estate. *Vyse v. Forter*, L.R. 7 H.L. 318. Z

(d) If they do so, they would be liable only for the loss to the estate. *Vyse v. Forter*, L.R. 8 C. App. 309. A

6.—“For the realization . . . trust property.”

(1) Realization of trust funds—Discretionary powers of trustees.

(a) Where, by the immediate realization of the trust funds, the trustee would have ruined one beneficiary from whom a large debt was due to the trust estate, and would have seriously prejudiced others, and, instead of doing so, the trustee arranged with the debtor for payment of money by instalments, held that the trustee was justified in taking the course, because he had exercised a sound discretion and such as the Court would have approved. *Ward v. Ward*, 2 H.L. Cas. 784. B

(b) But in all such cases, the trustee should apply for the sanction of Court. (*Ibid.*) C

(2) Interference of the Court—Fraud.

Where the exercise of discretion is infected by fraud or misbehaviour, or where they decline to undertake the duty, or where the discretion is mischievously or ruinously exercised, the Court would interfere. *Attorney General v. Governors of Harrow School*, 2 Ves. 552; *Maddeson v. Andrew*, 1 Ves. 59; *Gude v. Worthington*, 2 DeG. and Sm. 389. D

(3) Protection of trust property—Costs.

Every trustee is entitled to be allowed the reasonable and proper expenses incurred in protecting property committed to his care. *Bright v. North*, 2 Ph. 22Q. See *Scott v. Milne*, 25 Ch. D. 710. E

(4) Right to protect property from probable injury.

(a) If they have a right to protect property from immediate and direct injury, they have the same right where the injury threatened is indirect but probable. *Bright v. North*, 2 Ph. 200. F

6.—“For the realization . . . trust property”—(Continued).

- (b) So, where the trust was one in respect of public works, the expenses of the trustees in opposing a bill in Parliament were allowed. But it would be advisable on the part of the trustee to obtain the sanction of Court before incurring such extraordinary expense. (*Ibid.*) G

(5) Settlements—Provision as to repairs.

All well-drawn settlements of house property generally provide that the trustees shall keep it in repair. *Re Cartwright, Avis v. Newman*, 41 Ch. D. 532. H

(6) Effect of omission as to provision in respect of repairs in settlements.

- (a) Where a provision in respect of the execution of repairs to trust estate is omitted, a legal tenant for life of freeholds is not compellable to keep property in repair. And as the Court has no jurisdiction to make any order charging the cost of repairs, or any part of it, on the corpus, the result is extremely embarrassing and prejudicial to all parties. (*Ibid.*) I

- (b) In America it is settled that, in the absence of express power, an equitable life tenant cannot be interfered with by the trustee for the purpose of making repairs; and that, on the other hand, if the life tenant makes repairs, he must pay the cost himself. *Thurston v. Dickenson*, 2 Rich. Eq. 317; *Cogswell v. Cogswell*, 2 Ed. Ch. 231. J

(7) Execution of repairs—Application to Court.

To maintain the properties committed to his care in good condition, the trustee may apply to the Court to direct the repairs. *Re Hatchkeys*, L.R. 32 Ch. D. 408. K

(8) Repairs—Right to retain income for execution of.

The trustee has a right to retain income for the execution of repairs, but without prejudice to the ultimate rights of the tenants for life and the remainderman *inter se*. *Re Fowler, Fowler v. Odell*, 16 Ch. D. 273. L

(9) Direction by Court as to how the expenses of repairs are to be met.

The Court may empower the trustees to raise the necessary amount in such a way as will be equitable between income and corpus. *Underhill*, p. 198 (6th Ed.) M

(10) Trustees of leaseholds—Repairs.

A trustee of leasehold property may, without any order from Court, do such repairs as are necessary to prevent a forfeiture of the lease, and repay himself out of the income. *Re Fowler, Fowler v. Odell*, 16 Ch. D. 273. N

(11) Rules as to costs of execution of repairs.

(a) PROPERTY OUT OF REPAIRS AT COMMENCEMENT OF TRUST.

Where the estate is in disrepair when the tenant for life came into possession, then, whatever its tenure may be, the Court will not saddle the trustee exclusively with costs, but will sanction a mortgage equitably apportioning the ultimate cost between corpus and income. *Re Redding, Thompson v. Redding*, (1897), 1 Ch. 876. O

6.—“For the realization....trust property”—(Concluded).

(b) CURRENT REPAIRS OF LEASEHOLDS.

When the property is in good order, at commencement of trust, and is leasehold tenure, the equitable tenant for life, as he enjoys the income of the property, must act in accordance with the conditions of the lease as to repairs. *Re Partington, Reigh v. Fane*, (1902), 1 Ch. 711. **P**

(c) CURRENT REPAIRS OF FREEHOLDS.

Where it is freehold, repairs would be executed, only in cases of salvage. *Re Wills, Wills v. Wills*, (1902), 1 Ch. 15. **Q**

(d) ALTERATIONS IN THE NATURE OF REPAIRS.

Improvements authorised by the Settled Land Act (1882) may include additions to or alterations in buildings reasonably necessary for the same to be let, and also the rebuilding of the principal mansion house. In this latter case, the sum to be applied out of capital money must not exceed one half of the annual rent of the settled land. S. 13 of S. L. A. 1890 (53 and 54 Vic. C. 69). **R**

(12) Trust to make repairs out of rent—Borrowing by trustee—Right to interest.

If the trust be to make repairs out of rents, and the trustees borrow money to make the repairs, and then repay themselves out of rents, they cannot claim interest on the money borrowed, for the trust was to apply the rents after they had accrued. *Fazakerley v. Culshaw*, 19 W. R. 793. **S**

(13) Costs incident to administration.

All costs incident to the administration and protection of the trust property are borne by the corpus of the estate, unless they relate exclusively to the tenant for life. *Sanders v. Miller*, 25 Beav. 154. *Re Marner's Trusts*, 3 Eq. 432. **T**

(14) Breach of trust—Trustee's remedy.

(a) FILING A BILL.

Anticipating a breach of trust by a co-trustee, a trustee may file a bill against him and thus prevent the breach. *Re Chertsey Market*, 6 Price 261. **U**

(b) INJUNCTION.

Where a trustee threatens to commit breach thereof, his co-trustee should prevent the same by means of obtaining an injunction against him. (*Ibid.*) **Y**

(15) Tenant for life committing waste—Trustee's remedy.

Where a tenant for life is about to commit waste, trustees to preserve contingent remainders could file a bill to restrain such waste. *Guth v. Cottam*, 3 Atk. 751. **W**

7.—“For the protection....beneficiary....contract.”

(1) Support of beneficiary.

(a) A trustee must do everything necessary for the proper support of a *cestui que trust* incapable of supporting himself. *Howarth*, 8 Ch. A. 415. **X**

(b) “A trustee may expend sums of money for the protection and safety, or support, of a *cestui que trust* who is incapable of taking care of himself, but the more prudent course is to apply to the Court.” Lewin, 11th Ed., p. 707; *Duncombe v. Nelson*, 9 Beav. 211; see *Chester v. Rolf*, 4 De G. M. and G. 798. **Y**

7.—“For the protection....beneficiary....contract”—(Continued).

(2) Power to allow maintenance to infants.

Trustees might allow, by way of maintenance, a part of the income from the estate, to the father of an infant beneficiary, where the father could not support it according to its portion, if the circumstances showed that the settlor looked on the infant as his heir. *Scisson v. Shaw*, 9 Ves. 285; *Jervoise v. Silk*, 1 G. Coop. 52, *Hunt v. Parry*, 32 Ch. D. 382; see, also, *Re Lefthouse*, L.R. 29 Ch. D. 921. Z

(3) Payment of maintenance—Source.

(a) The trustee must generally pay maintenance out of interest. *Ex parte Chambers*, 1 R. and M. 577. A

(b) But where the amount of an infant's legacy is inconsiderable, the Court would, in the absence of other means, direct maintenance to the child out of the principal itself. *Ex parte Green*, 1 J. and W. 283, *Barlow v. Grant*, Vern. 255. B

(4) Power to give a larger sum by way of maintenance.

Where the testator directs payment of a sum for maintenance and accumulation of the balance, a larger sum could be given to the infant by way of maintenance. *Havelock v. Havelock*, L.R. 17 Ch. D. 807. C

(5) Power to give maintenance even if there is no provision.

Similarly if a testator directs accumulation of the income only, without making any provision for maintenance of the infant, the executor could grant maintenance. *Re Collins*, L.R. 32 Ch. D. 229. *Re Walker* (1901), 1 Ch. 879. D

(6) Past maintenance.

The trustee have a discretionary power to apply past accumulations of income in payment for past maintenance. *Re Pitt's settlement*, W.N. 1884, p. 225. E

(7) Power to allow maintenance out of capital.

A trustee may, under special circumstances, as for instance, where the capital is considerable, allow maintenance out of capital. But, generally, the trustee would not be well-advised to do so. *Barlow v. Grant*, 1 Vern. 255; *Walker v. Wetherell*, 6 Ves. 473. F

(8) Power to make advancement.

(a) A trustee may utilise part of an infant's capital for its advancement in the world. But he would do well to get the sanction of Court before hand. *Boyd v. Boyd*, 4 Eq. 305, *Roper-Curzon v. Roper-Curzon*, 11 Eq. 452. G.

(b) A part of the capital may be sunk by a trustee, without the direction of the Court, for the advancement of a child, where the same sums, if expended for maintenance, would not have been allowed. *Swinnock v. Crisp*, Freem. 78; *Walker v. Wetherell*, 6 Ves. 477. H

(c) But if the effect of the advancement is that the contingent rights of another beneficiary are injured, the trustee will do it at his peril. *Worthington v. M'Crazor*, 23 Beav. 81. I

7.—“For the protection....beneficiary....contract” —(Concluded).

(d) So, where £100 was bequeathed upon trust to apply the income towards the maintenance and education of A, during his minority, and upon trust to pay the corpus to him on attaining twenty-one, but in case of his dying before that age, upon trust for X, it was held that, as against X, the trustees had no authority to advance part of the capital to A, who died before attaining his majority. *Lee v. Brown*, 4 Ves. 362. J

8.—“Except....Jurisdiction.”

(1) Control of the Court over trustees.

(a) ARBITRARY POWERS.

Where a power is given to trustees to do or not to do a particular thing at their discretion, the Court will not control them, provided their conduct be *bona fide*, and their action is not influenced by improper motives. *Thomas v. Pering*, 19 Keen. 729; *Talbot v. Marshfield*, 2 Dr. and Sm. 285. K

(b) POWER WITH A DUTY.

Where the power is accompanied with a duty, the Court will compel the execution, or execute it in the place of the trustee. *Tempest v. Lord Camoys*, 21 Ch. D. 571. L

(2) Court, when can interfere.

A mere injudicious exercise of the discretion vested in the trustee cannot justify the interference of the Court. So long as the trustee exercises, properly and in good faith, the discretion absolutely vested in him, the Court cannot interfere. *Uisborne*, 2 A.C. 300. See *Thomas v. Derrington*, 1 Keen. 729. M

9.—“No trustee....21 years....obtained.”

(1) Time of demise.

Under the Settled Land Act (1882), a trustee cannot give a lease for more than 21 years, except with the sanction of the Court. N

(2) Reservation of rent.

Under S. 43 of the Agricultural Holdings Act (England), 1883, a lease of a holding could be given, provided the best rent or reservation in the nature of rent is reserved. O

37. Where the trustee is empowered to sell any trust-property,

Power to sell in lots, and either by public auction or private contract 1.

he may sell the same subject to prior charges or not, and either together or in lots, by public auction or private contract, and either at one time or at several times, unless the instrument of trust otherwise directs.

(Notes).

1.—“Power to sell....contract.”

(i) Trust property, how sold.

(a) If a trustee is authorised by the instrument of trust to sell the trust property, he may conduct the sale either by public auction or private contract, as he may think most advantageous. *Ex parte Dunman*, 2 Rose. 66. P

1.—“Power to sell....contract”—(Continued).

(b) Trustees can sell by public auction or by private contract, unless the provisions of the trust deed exclude one of those modes of sale. *Daniel v. Adams*, Amb. 495. Q

(c) Before selling by private contract, the trustees need not have previously attempted a sale by public auction or even have inserted a public advertisement that the property was for sale. *Davy v. Durrant*, 1 De G. and J. 535. R

(2) Sale of trust property—Decision of Court in cases of doubt.

When the trustee entertains a doubt as to the mode in which the trust property is to be sold, he can obtain the advice of the Court. *Ex parte Hughes*, 6 Ves. 616. S

(3) Trustee's power to sell without applying to Court.

(a) A trustee for sale, if he is not a party to a suit, can enter into contracts, without getting the previous sanction of the Court. *Earl of Bath v. Earl of Bradford*, 2 Ves. 590. T

(b) But if a suit has been launched for executing the trust, that attracts the Court's jurisdiction, and hence, the trustees cannot sell without the sanction of the Court. *Walker v. Smalwood*, Amb. 676. U

(c) So, subsequent to the filing of suit, trustees can only enter into private contracts, subject to the sanction of the Court. *Lewin*, 11th Ed., p. 493. V

(4) Sale not to be delegated.

(a) A trustee cannot, without responsibility, delegate the general trust for sale. *Hardwick v. Mynd*, 1 Aust. 109. W

(b) But he can employ agents, if such a course is in conformity with the common usage of business, and the trustee acts as prudently for the beneficiary as he would have done for himself. *Ex parte Belchier*, Amb. 218. X

(c) But an agent for sale is not competent to receive the purchase-money. *Lewin*, 11th Ed., p. 508. Y

(5) Power to sell in lots.

(a) Trustees have the—, whenever such a course is advisable as the most advantageous one. *Lewis*, 1 G. I. and J. 69. Z

(b) When selling by auction, trustees may sell in different lots, if that seems to be the course most likely to attract purchasers. *Ord v. Noel*, 5 Madd. 438. A

(c) But it is not the case, if the trust-deed provides that the property is to be sold in one lot. See *Agnew*, p. 223. B

(d) It is not a breach of trust to sell all the lots, although the sale is to raise a specific sum which is reached by the biddings for some only of the lots. *Thomas v. Townsend*, 16 Jutr. 736. C

(6) Sale auction to be advertised.

A trustee wishing to sell the trust property by public auction must take care to see that the property has been properly advertised, and that due notice of the sale is given. *Ord v. Noel*, see *Agnew*, p. 223. D

1.—“Power to sell....contract”—(Continued).

(7) Sale to be advantageous.

- (a) It is the duty of a trustee selling under a power or trust, to sell to the best advantage and thus secure the best price procurable. *Ord v. Noel*, 5 Madd. 438. **E**
- (b) He is to sell the estate under every possible advantage to his *cestui que trust*, using all possible diligence in the matter. *Downs v. Grazebrook*, 3 Mer. 209. **F**

(8) Several beneficiaries—Trustee to be impartial.

- (a) If there are several successive *cestui que trust*, he must sell, with a fair and impartial attention to the interests of all the parties interested. *Ord v. Noel*, 5 Madd. 440. **G**
- (b) If he advance the interests of one party at the expense of another, he will be responsible for the loss to the suffering party. *Pechel v. Fowler*, 2 Ans. 550. **H**

(9) Good attendance of bidders to be secured.

- (a) It is the duty of the trustee to see that the sale is not held on a day when it is not possible to secure a good attendance of bidders. *Orme v. Wright*, 3 Jur. 19. **I**
- (b) Trustees failing in reasonable diligence in inviting competition are personally responsible for the loss to the suffering party. *Ord v. Noel*, 5 Madd. 440. **J**

(10) Property—Valuation.

- (a) A trustee, prior to his proceeding with the sale, must obtain a proper valuation. *Noble v. Edwards*, 8 Price 165. **K**
- (b) A trustee for sale should have to inform himself of the real worth of the property. To meet this end, he might, if expedient, have it estimated by an experienced person. *Oliver v. Court*, 8 Price 165. **L**

(11) Expense of proper valuation.

The—may be charged on the trust estate. *Sug V. and P.* 60. **M**

(12) Sale at grossly inadequate value, a breach of trust.

A sale of trust property at a grossly inadequate value being a breach of trust, the title of the purchaser will be affected by such sale. *Stevens v. Austen*, 7 Jur. N.S. 673. **N**

(13) Survival of trust for sale.

- (a) On an estate being vested in several trustees, on trust to raise an amount by sale or mortgage, if one of the trustees die, it is competent for the survivor or survivors to sell or mortgage. *Lane v. Debenhans*, 11 Hare 188. **O**
- (b) It is otherwise, if, in the settlement, there are words expressly declaring that the trust shall not be exercised by the survivors or survivor. (*Ibid.*) **P**
- (c) But the presumption is that as is the estate, so the discretionary part of the trust passes to the survivors or survivor. (*Ibid.*) **Q**
- (d) Even if there is a proviso for appointment of new trustees, a trust for sale survives. See *Foby v. Wontnes*, 2 J. and W. 246. **R**

1.—“Power to sell....contract”—(Continued).

(14) *Cestui que trust*, all *sui juris*—Effect.

(a) A trust for sale is not ended by reason of all the *cestui que trust* becoming *sui juris*. *Biggs v. Peacock*, 22 Ch. D. (C.A.) 284. S

(b) But on their agreeing to take the property as realty, the trust for sale comes to an end. (*Ibid.*) T

(15) Misstatement as to condition of property—Reduction in price—Portion of purchaser.

(a) If the trustee makes a misstatement as to the condition of the property, on account of which the contract price is liable to be reduced, he is responsible for the same. *Tomlin v. Luce*, 41 Ch. D. 573. U

(b) The Court, even though the conduct of the purchaser is proper, will not permit specific performance of the agreement at such purchaser's instance. *Ord v. Noel*, 5 Madd. 440. Y

(16) *Bona fide* sale—Effect of offer of higher price.

But on a trustee having once agreed to sell *bona fide*, such contract will not be invalidated, for the reason that another has come forward to give a higher price. *Harper v. Harper*, 2 Giff. 210; reversed, 2 DeG. F. and J. 542. W

(17) Offers on equally advantageous terms—*Cestui que trust's* man need not be preferred.

If two persons make offers on equally advantageous terms, and if one of them is preferred by the *cestui que trust*, the trustees, against their own views, are not bound to accept the offer of the person preferred by the *cestui que trust*. *Selby v. Bowie*, 4 Giff. 300. X

(18) Trustee for sale for payment of debts, bound to answer enquiries.

It is the duty of a trustee for sale for payment of debts to answer enquiries by the author of the trust or those claiming under him, as to estates sold and debts paid. *Clarke v. Earl of Ormonde*, Jac. 120. Y

(19) *Cestui que trust* contracting conditionally to sell—Subsequent assent of trustee.

The *cestui que trust*, the person most interested in the matter, and having the strongest motives for obtaining the highest price possible, may contract conditionally and then get the assent of the trustee, who, on being satisfied that the proposed amount is the value of the property, sanctions a sale beneficial to his beneficiary. *Palavret v. Carew*, 32 Beav. 568. Z

(20) Each trustee responsible for sale.

A trustee's not taking an active part in the concern is no excuse for his saying that he had nothing to do with the conduct of the managing trustee. Each is responsible for the faithful discharge of their joint duty by the person to whom the management was confided. *Oliver v. Court*, 8 Price 166. A

(21) Injunction to restrain improper sale.

The Court will grant an injunction to restrain a sale by public auction by a trustee, if the trustee neglects to have the property properly advertised and to give due notice of the sale. *Webb v. Shaftesbury*, 7 Ves. 480; Anon. case, 6 M. 10. B

1.—“Power to sell....contract”—(Continued).

(22) *Cestuis que trust* whether to be made parties.

(a) When trustees are empowered to sign discharges for the purchase money, the *cestuis que trust* need not be made parties for the deed. *Binks v. Lord Rolley*, 2 M. 227. C

(b) But wherever practicable, they are usually made parties to the deed, so that they may also enter into covenants for title to the extent of their respective interests,—the trustees being bound to covenant against their own incumbrance only. *Re London Bridge Acts*, 13 Sim. 176. D

(c) However, they are not made parties, in sales under the direction of the Court of Chancery. *Wakeman v. Duchess of Redland*, 3 Ves. 237, 504. E

(23) *Sale a breach of trust.*

The Court has no power to enforce the specific performance of a contract amounting to a breach of trust. *Wood v. Richardson*, 4 Beav. 176. F

(24) *Land discharged on being raised.*

(a) When money is actually raised, the land is discharged. This is the case, even if the proceeds are misapplied and do not reach their proper destination. See Lewin, 11th Ed., p. 525. G

(b) Aggrieved parties should proceed against trustees personally. They cannot claim a lien on the estate. *Anon.* 1 Salk 153. H

(25) *Vouchers, custody of.*

(a) On the final settlement of the affairs of the trust, the trustees have the right to the possession of the vouchers as their discharge to the beneficiaries. *Clarke v. Earl of Ormonde*, Jac. 120. I

(b) But the beneficiaries can inspect them. (*Ibid.*) J

(c) The beneficiaries have no right to get copies without paying for them. (*Ibid.*) K

(26) *Trustee for sale not empowered to grant leases.*

A trust for sale does not *prima facie* imply a power to grant a lease. *Evans v. Jackson*, 8 Sim. 217. L

(27) *Executor granting lease.*

It is only under certain special circumstances can an executor, a *quasi* trustee for sale, be justified in granting a lease. *Hackett v. M'Namara, Le. and G. Rep. t. Plunket*, 283. M

(28) *Trustee for sale, selling by way of underlease.*

A trustee for sale of leaseholds, whose duty is to sell in such a way that his liability to the lessor may not continue, is not in general at liberty to sell by way of underlease. *Re Walker and Oakshot's Contract*, (1901), 2 Ch. 383. N

(29) *Trustee for sale not to give option to purchase.*

Executors, administrators and trustees cannot insert in a lease a clause, granting the lessee, during the term, an option of purchasing the property at a fixed price. *Oceanic Steam Navigation Co., v. Sutherland*, 16 Ch. D. (C.A.) 236. O

1.—“ Power to sell....contract ”—(Included).

(30) Power of trustee for sale to mortgage.

(a) In the absence of anything to negative the intention of the settlor to convert the estate absolutely, a trust for sale will not empower a trustee to give a mortgage. *Haldenby v. Spofforth*, 1 Beav. 390. **P**

(b) But where the estate devised to trustees is charged with debts, and sale is not the testator's primary object, the trustee may, to pay the debts, more properly mortgage than sell. *Ball v. Harris*, 4 M. and Cr. 264. **Q**

(31) Trust to mortgage not authorising sale.

A trust for raising money by mortgage will not authorise a sale, though such a sale may be more advantageous to the estate. *Drake v. Whitmore*, 5 DeG. and Sm. 619. **R**

(32) Power of sale not authorising partition.

Where trustees have a power to sell, they cannot authorise a partition. *M^r Queen v. Farguhas*, 11 Ves. 467. **S**

38. The trustee making any such sale may insert such reasonable stipulations either as to title or evidence of title, or otherwise, in any conditions of sale or contract for sale, as he thinks fit; and may also buy in the property, or any part thereof, at any sale by auction, and rescind or vary any contract for sale, and re-sell the property so bought in, or as to which the contract is so rescinded, without being responsible to the beneficiary for any loss occasioned thereby.

Power to sell
under special condi-
tions 1.

Power to buy in
and re-sell 2.

Where a trustee is directed to sell trust-property or to invest trust-money in the purchase of property, he may exercise a reasonable discretion as to the time of effecting the sale or purchase.

Time allowed for
selling trust-pro-
perty 3.

Illustrations.

4 (a) A bequeaths property to B, directing him to sell it with all convenient speed, and pay the proceeds to C. This does not render an immediate sale imperative.

5 (b) A bequeaths property to B, directing him to sell it at such time and in such manner as he shall think fit, and invest the proceeds for the benefit of C. This does not authorize B, as between him and C, to postpone the sale to an indefinite period.

(Notes).

Principle of section.

A trustee for sale has power to sell under special condition, buy in, re-sell, and fix the time for selling. *Whitley Stokes*, Vol. I, p. 827. **T**

1.—“ Power to sell under special conditions.”

(1) Sale, conditions of.

(a) It is the duty of the trustee to take care that every necessary and no unnecessary condition is attached to the sale. *Ex parte Lewis*, 3 Gl. and J. 173. **U**

1.—“Power to sell under special conditions”—(Continued).

- (b) It is competent for a trustee to sell, subject to any reasonable conditions of sale. *Hobson v. Bell*, 2 Beav. 17. **Y**
- (c) The conduct of a trustee cannot be justified, if he clogs the property with restrictions evidently uncalled for by the state of the title. *Wilkins v. Fry*, 2 Rose. 375. **W**
- (d) The conditions subject to which the sale is made should not be unnecessarily depreciatory. See *Godefroi*, p. 428. **X**
- (e) But a depreciatory condition does not render a sale invalid, unless it appears that the price was thereby rendered inadequate. The sale cannot be impeached after conveyance on that score, unless the purchaser and trustee were acting collusively. A purchaser cannot make any objection to title on the ground that a condition of sale was unnecessarily restrictive. See *Trustee Act*, 1893, ss. 14 and 15. **Y**
- (f) Even when a large discretion has been given to a trustee for sale, and he acts on proper legal advice, he *ought not to use a depreciatory condition*, and he will be held liable for mistakes, even though he might have been led into them. *Dance v. Goldingham*, 8 Ch. 902; *Dunn v. Flood*, 28 Ch. D. 586. **Z**

(2) Limit of time to objections to title.

It is open to trustees for sale to enter into stipulations, specifying a certain time within which any objection to the title shall have to be taken. *Dunn v. Flood*, 28 Ch. D. 586; *Mawson v. Fletcher*, 6 Ch. 91. **A**

(3) Contract involving hardship.

A contract against trustees involving extreme hardship is not enforceable by a Court. *Wedgwood v. Adams*, 6 Beav. 600. **B**

(4) Trustee to give good title.

A trustee, like any ordinary vendor, must show the purchasers a good title. *White v. Foljambe*, 11 Ves. 343. **C**

(5) Exceptions from obligation to make out good title.

Trustees for sale may protect themselves, by express stipulations, from the obligation to make out a good title, ordinarily the covenant for title entered into by them will hold good only as against incumbrances created by themselves. *White v. Foljambe*, 11 Ves. 337. **D**

(6) Title—Counsel's opinion.

Before execution of trust can be proceeded with, it would be proper to take the counsel's opinion whether a good title can be deduced. See *Lewin*, 11th Ed., p. 505. **E**

(7) Covenants.

- (a) It is not proper to compel a trustee for sale to enter into any other covenant for title than against incumbrances by his own acts. *White v. Foljambe*, 11 Ves. 345. **F**
- (b) Where a trust for sale has to be exercised with the consent or at the request of a life-tenant who joins in a sale, the purchaser is probably entitled to require him to enter into the usual covenants for title. *Poulteth v. Hood*, 5 L.R. Eq. 115. **G**
- (c) Mortgagees covenant only against their own acts, they being regarded as trustees. *Sugd. Vend. and Pur.* p. 69 (14th Ed.). **H**

1.—“Power to sell under special conditions”—(Concluded).

(8) Clearing title.

A trustee for sale has liberty to do all reasonable acts, which, he is professionally advised, are proper for clearing the title and completing the sale.
Forshaw v. Haggins, 8 De G. M. and G. 827. I

(9) Purchaser may set aside sale by trustee.

Every purchaser, aggrieved by the results of a sale to him by a trustee for sale, may, on proper grounds, get the sale set aside with costs. *Marsh v. Lord Granville*, 24 Ch. D. 11. J

2.—“Power of trustee to buy in and re-sell.”

(1) Principle of Section.

In the absence of anything to the contrary in the settlement itself, a trustee has power to buy in the trust property or part thereof at any auction, or to rescind or vary any contract for sale, and to re-sell, without being answerable for any loss, if he acted *bona fide*. See Lord Cranworth's Act. Lewin, 11th Ed., p. 421. K

(2) Reserve price.

A trustee may fix a reserve price in bidding. *Conolly v. Parsons*, 3 Ves. 628 (n). L

(3) Trustee, when can buy in.

(a) On the amount fixed not being reached at the sale, the trustee may buy in the property at that price. *Re Repton*, 30 Beav. 252. M

(b) Court's sanction to a sale at the reserve to one of the trustees is also often permitted. *Farmer v. Dean*, 32 Beav. 327. N

(4) Trustee to be careful in re-sale.

In reselling, the trustee should be very careful not to cause any delay.
Taylor v. Tabrum, 6 Sim 281. O

(5) Delay in re-sale—Trustee's liability.

Else, he may be taken to task, for any loss on re-sale (*Ibid.*) P

(6) Trustee of bankrupts.

A — has no liberty to buy in at the auction without the creditor's authority.
Ex parte Lewis, 1 Cl. and J. 69. Q

3.—“Time allowed for selling trust property.”

(1) Time allowed for disposing of estate.

(a) A trustee is at liberty to take a reasonable time for disposing of the trust estate. *Buxton v. Buxton*, 1 M. and Cr 80. R

(b) Time-limit for sale varies with the nature of the property. *Hughes v. Empson*, 22 Beav. 181. S

(2) Direction to sell with all convenient speed—Nature of.

(a) Where trustees are directed to sell with all convenient speed, such direction does not necessarily mean that they must carry out the sale immediately. (*Ibid.*) T

(b) Where the trustees were to sell “with all convenient speed and” “within five years”, the limitation to five years was held not to be peremptory, but merely directory, so that the trustees could validly sell after the lapse of such period. *Pearce v. Gardner*, 18 Hare. 297. U

3.—“Time allowed for selling trust property”—(Concluded).

(c) By such postponement, trustees have no right to vary relative rights of persons interested, and thus interfere with the intention of the settlor. *Walker and Shore*, 19 Ves 391. **Y**

(3) Direction to sell conveniently, not implying indefinite postponement.

A direction to the trustees to sell at such time and in such manner as the trustees shall think fit, should not be taken as empowering them (as between them and their *cestui que trust*) to postpone the sale indefinitely. (*Ibid.*) **W**

(i) Trustee neglecting to sell, liability of

A trustee directed to sell with all convenient speed, who, without sufficient grounds, neglected to carry out a sale for so long a period as twenty years, was held to be liable for the depreciation in the value and to be accountable for interest in lieu of rents. *Fry v. Fry*, 27 Beav. 144. **X**

(5) Trustee cannot agree to sell at a future time

A trustee for sale cannot enter into any agreement as to selling the property at some future time, for, the value of the property is liable to change before such time. *Oceanic Steam Navigation Co. v. Sutherland*, 16 Ch D 236 **Y**

(6) Delay in sale—Smaller sale-proceeds.

Where trustees refused two offers, and after five years sold the property for half the amount offered, they were held responsible for the difference. *Taylor v. Tobrum*, 6 Sim. 281. **Z**

(7) Discretion as to sale

A trust for sale at discretion simply vests in the trustees a discretion as to the time and mode of sale. *Newman v. Sindana*, 81 L.T. 421. **A**

(8) Proper exercise of discretion—Test.

The particular facts of each case must be looked to, for finding out whether trustees have exercised such discretion. *Burton v. Burton*, 1 My. and Cr. 93. **B**

(9) Executor's discretion to sell.

Where a testator died possessed of crystal palace shares, and it was contended that the executors were to be responsible for the value at the end of two months, *held*, that they had a discretion whether to sell or not at the end of twelve months. *Hughes v. Empson*, 22 Beav 181. **C**

4.—“III. (a).”

Burton v. Burton, 1 M. and C. 80, forms the basis of this illustration. **D**

5.—“III. (b).”

Walker v. Shore, 10 Ves. 391, can be regarded as the basis of this illustration. **E**

39. For the purpose of completing any such

Power to convey 1. sale, the trustee shall have power to convey or otherwise dispose of the property sold in such manner as may be necessary.

(Note).

1.—“Power to convey.”

On the sale of the trust-property, either by public auction or private contract, the trustee is in duty bound to convey that property in such manner as may be necessary. See Agnew, p. 225. **F**

40. A trustee may, at his discretion, call in any trust-property invested in any security, and invest the same on any of the securities mentioned or referred to in section 20, and from time to time vary any such investments for others of the same nature

Provided that, where there is a person competent to contract, and entitled at the time to receive the income of the trust-property for his life, or for any greater estate, no such change of investment shall be made without his consent in writing ²

(Notes)

(N.B.)—See also notes under S 20, *supra*.

See S. 49, *infra* Whit. Stok. Anglo-Indian Codes, Vol. I, p. 856.

Principle of section

The trustee may vary investments, but only with the consent in writing of the beneficiary, when the latter is competent to contract and entitled at the time to receive the income of the trust-property for his life. Whit. Stok., Vol. I, p. 827 **G**

1.—“Power to vary investments.”

(1) Exercise of discretionary power to vary investments

(a) The discretion given to the trustee in the matter of his varying investment of one nature into that of another must be exercised by him with a view to the furtherance of the trust, and not for the purpose of extraneous objects as the accommodating of a borrower. *Pell v. Downton*, 2 De G. and J 18 **H**

(b) A trustee has the power to sell the property and invest the sale-proceeds on any of the authorised securities, and also to vary such investments from time to time, but he should never buy any redeemable security at a premium. *Waste v. Littlewood*, 41 L J Ch. 636 See Agnew, p. 226. **I**

(2) Court not interfering with trustee's discretion

The Court will not interfere with the trustee's discretion as to one of several modes of investment, although the result may be to vary the relative rights of the *cestui que trust*. *Mint v. Leman*, 20 Beav. 260 **J**

(3) Scope of trustee's powers

A trustee is not allowed the same discretion in investing the moneys of the trust, as if he were a person *sui juris* dealing with his own estate. 30 B. 591 = 8 Bom. L.R. 883. **K**

1.—“Power to vary investments”—(Concluded).

(4) Guardian—Change of investment.

Guardians are in a fiduciary position, and the Court should ordinarily be guided by the rules embodied in the Act in sanctioning changes in the investments of the minor's property. 30 B. 591=8 Bom. L. R. 883. **L**

(5) Court's discretion in sanctioning change.

In the case of trustees in whom property is invested, the Court could not, apart from any special investment clause in the instrument of trust, sanction a change of investment into any securities other than those referred to in S. 20. 30 B. 591=8 Bom. L. R. 883. **M**

(6) Trustee selling out stock and investing on mortgage.

If there is power to vary, trustees may sell out stock and invest the amount on mortgage. See Lewin, 11th Ed., p. 366. **N**

2.—“Consent in writing.”

Written consent.

(a) Where the consent is to be in writing, that provision must be strictly complied with. *Cocker v. Quayle*, 1 R. and My. 535; *Morris v. Wright*, 14 Beav. 291. **O**

(b) The consent of the person (entitled at the time to receive the income of the trust-property for his life) should precede or accompany the execution of the power. But where an investment has been varied without the required consent, he cannot complain if he has acquiesced in the change. *Stevens v. Robertson*, L. J. Ch. 499. **P**

41. Where any property is held by a trustee in trust for a

Power to apply
property of minors,
&c., for their main-
tenance, &c. 1.

minor, such trustee may, at his discretion, pay to the guardians (if any) of such minor, or otherwise apply for or towards his maintenance or education or advancement in life or the reasonable expenses of his religious worship, marriage, or funeral, the whole or any part of the income to which he may be entitled in respect of such property; and such trustee shall accumulate all the residue of such income by way of compound interest, by investing the same and the resulting income thereof from time to time in any of the securities mentioned or referred to in section 20, for the benefit of the person who shall ultimately become entitled to the property from which such accumulations have arisen: Provided that such trustee may, at any time, if he thinks fit, apply the whole or any part of such accumulations as if the same were part of the income arising in the then current year.

Where the income of the trust-property is insufficient for the minor's maintenance or education or advancement in life, or the reasonable expenses of his religious worship, marriage, or funeral,

the trustee may, with the permission of a principal Civil Court of original jurisdiction, but not otherwise, apply the whole or any part of such property for or towards such maintenance, education, advancement, or expenses.

Nothing in this section shall be deemed to affect the provisions of any local law for the time being in force relating to the persons and property of minors.

(Notes).

(N.B.)—See also notes under S 36, *supra*.

Origin of section

The Committee had expressly provided, in S. 41 of the Bill, that the income of property held in trust for a minor might be applied for the reasonable expenses of his religious worship. See report of Select Committee on Trusts Bill.

1.—“Power to apply . . . maintenance, etc.”

(1) Option of trustee providing for maintenance.

The trustee providing for the maintenance of the infant beneficiary has the option, either to himself directly spend for the purpose, or pay over the necessary money to the hands of the parents or guardians of the infants *Re Cotton*, 1 Ch. D. 232.

(2) Discretion subject to control of Court.

The discretionary power given to the trustees for the maintenance, etc., of minor beneficiaries is subject to the general controlling power vested in the Court over all trustees. *Davey v. Ward*, 7 Ch. D. 754.

(3) Whether trustees can give maintenance

(a) WHERE THE MINOR'S LEGACY IS SUBJECT TO LIMITATION IN FAVOUR OF THIRD PERSON.

Where the legacy in favour of the infant has been given with a limitation over to a third party, the trustees cannot, without the Court's authority, exercise their power to allow maintenance to the infant, nor could the Court pass orders on the matters without the institution of a suit. *Re Breed's Will*, 1 Ch. D. 226.

(b) WHERE THE MINOR HAS ONLY A CONTINGENT INTEREST.

Where the infant has only a contingent interest, the power to allow maintenance exists in case of contingent portions charged as land. *Jones v. Greaves*, 2 Ch. 683.

(c) ALLOWANCE IN RESPECT OF PAST MAINTENANCE.

In suitable cases, trustees can make provision even in respect of past maintenance of infants. *Brown v. Smith*, 10 Ch. D. 377.

42. Any trustees or trustee may give a receipt in writing for

Power to give receipts 1. any money, securities, or other moveable property payable, transferable, or deliverable to them or him by reason, or in the exercise, of any trust or power; and, in the absence of fraud, such receipt shall discharge the person paying, transferring, or delivering the same therefrom,

and from seeing to the application thereof, or being accountable for any loss or misapplication thereof ².

(Notes).

I.—“ Power to give receipts.”

(1) Provision for giving receipts.

In well-drawn settlements, a power is usually inserted, authorising the trustees to give receipts for trust monies, etc., paid to them. Agnew, p. 218. **W**

(2) Omission to insert such power—Effect of—Reasons.

(a) Where there is no such power given to the trustee under the settlement, it is incumbent on the person paying trust money to see that it is applied as directed by the instrument of trust. *Elliot v. Merziman*, Barn. 781, W and J. L.C. 59. **X**

(b) The reason is that, at law, the trustees being the owners, they can give valid discharge. The *cestus que trustent* being the owners in equity, Equity Courts hold that a purchaser must get a discharge from them, unless the instrument of trust authorises the trustees to give receipts. Agnew, p. 229. **Y**

(3) All trustees must join in receipt

All the trustees must join in giving receipts for any property transferred to them as trustees. Tagore Law Lectures, p. 228. **Z**

(4) Provision in respect of giving receipts, in settlement—Effect of.

A power of signing receipts in a settlement will extend only to what the trustees are, under the provisions of the settlement, authorised to receive. *Pell v. De Winton*, 2 De G. and J. 20. **A**

(5) One of the trustees, a married woman—Her power to give receipts.

Where one of the trustees is a married woman, she has no power to give receipt, nor could money in respect of the trust estate be paid to her husband, he being a stranger, the safe course would be to pay the money into a bank in the joint names of the trustees, and to take a written receipt from the trustees, to be also signed by the husband, as sanctioning the receipt by the wife. *Kingsman v. Kingsman*, 6 Q. B.D. (C.A.) 122. **B**

(6) Husband's concurrence when not necessary for wife's receipt.

(a) The concurrence of the husband may be dispensed with, if he has abjured the realm or is an outlaw. (*Ibid.*) **C**

(b) Or if she had been married since 1882, or if she had undertaken the trust since 1882, her receipt without the husband's concurrence would be valid, for the husband is not responsible for her acts, unless he has intermeddled in the trust. 45 and 46 Vic., C. 75, Ss. 1, 2, 5. **D**

(7) Payment to one trustee, on receipt signed by all.

On a receipt signed by all the trustees having been obtained, payment may validly be made to one of them only. *Webb v. Headgam*, 1 K. and J. 385. **E**

1.—“Power to give receipts”—(Concluded)

(8) Receipt from one of several trustees, insufficiency of.

Where the solicitors, employed by the several trustees of a will jointly, paid over the realised money to, and obtained receipts from, one of such trustees only, such receipt could not amount to a sufficient discharge to them for the money realised under the joint authority of the several trustees. *Ice v. Sutankey*, L R 15 Eq 204. **F**

(9) Receipt of executor—When sufficient

The receipt of an executor was considered sufficient, where the subject to which it related was personal estate *Charlton v Earl of Durham*, L.R. 4 Ch App. 438. **G**

(10) Trustees having no power to give receipts—Duty of purchasers.

(a) Where a purchaser is bound to see the money applied according to the trust, and the trust is for payment of debts and legacies, he must see the money actually paid to the creditors or legatees. In such cases, each creditor or legatee, upon receiving his money, should give as many receipts as there are purchasers, so that each purchaser may have one. *Sug. V. and P* 848 (11th Ed.) **H**

(b) Another method of securing the interests of the purchaser is to secure an assignment, by all the creditors and legatees, of their debts and legacies, to a trustee, with a declaration that his receipts shall be sufficient discharges. (*Ibid.*) **I**

2. “In the absence of fraud. thereof.”

(1) Duties of purchasers from trustees—English common law

(a) A purchaser is in all cases bound to see to the application of his purchase-money, unless a positive intention to the contrary on the part of the settlor be either expressed or implied in the instrument creating the trust. *Forbes v. Peacock*, 11 Sim. 152 **J**

(b) The better principle would be this—*Prima facie* a direction to sell should imply in all cases a power of signing discharges, but where it is practicable, and no impediment to the execution of the trust is thereby created, the purchaser should pay his money directly to the party beneficially entitled. *Lewin*, p. 553 (11th Ed.). **K**

(2) This principle of common law controlled by intention of settlor.

This principle of English common law is liable to be controlled and defeated by an intention to the contrary from the deed creating the trust, whether that intention be expressed or implied. *Lewin*, p. 530 (11th Ed.) **L**

(3) Trust for payment of debt—Duty of purchasers.

(a) Where the trust is for payment of debts and legacies generally, the buyer is not bound to see to the application of the purchase-money. *Johnson v. Kennel*, 3 M. and K. 624. **M**

(b) But it would be otherwise, if the trust be for payment of particular debts and legacies. (*Ibid.*) **N**

2.—“*In the absence of fraud...thereof*”—(Continued).^f

(4) This principle of common law—Modified by statutes.

(a) By 22 and 23 Vic., C. 35, S. 23, it is declared that *bona fide* payment to, and the receipt of, any person to whom any purchase or mortgage money shall be payable upon any express or implied trust, shall effectually discharge the person paying the same from seeing to the application of money, or being answerable for mis-application thereof, unless the contrary shall be expressly declared by the instrument creating the trust or security. **O**

(b) By 23 and 24 Vic., C. 145, S. 29, it was enacted that the receipts in writing of any trustees or trustee, for any money payable to them or him, by reason, or in exercise of, any trust or powers, shall be good discharges. **P**

(c) See, also, S. 36 of the Conveyancing and Law of Property Act (44 and 45 Vic., C. 41). **Q**

(d) The receipt in writing of any trustee, for any money, securities, or other personal property or effects, payable, transferable or deliverable to him under any trust or power, is made a sufficient discharge. Trustee Act (1893), S. 20. **R**

(5) Trust for sale—One of beneficiaries abroad—Trustee's power to give receipts. **.**

Where there is a trust for sale with a direction to distribute the proceeds between A, B and C, and where C, after the date of the instrument quits the country and goes abroad, the receipts of the trustees would *prima facie* be sufficient discharges, as necessary to the execution of the sale. Lewin, p. 553 (11th Ed.) **S**

(6) Trustee's receipt—Discharge to the purchaser of real estate, when.

(a) Under an express direction in the instrument creating the trust. *Binks v. Lord Rokeby*, 2 Madd. 227, 238. **T**

(b) Under an implied power —

(i) Where the trust is to sell the land for payment either of debts generally or of debts and also of legacies or annuities. *Forbes v. Peacock*, 1 Ph. 717. **U**

(ii) Where there are discretionary trusts for laying out the purchase-money. *Locke v. Lomas*, 5 Do G. and S M. 326. **Y**

(iii) Where an immediate power of sale is conferred, and the terms of the trust show that the settlor contemplated that the beneficiaries would not then be ascertainable or would be under disability. *Balfour v. Welland*, 16 Ves. 151. **W**

(7) Trustee's receipt—Purchaser of real estate, when not discharged by.

(a) Where the trust is for payment either of legacies or annuities only. *Johnson v. Kennett*, 3 M. and K. 624. **X**

(b) Where the purchaser has actual or constructive notice that the sale is, in fact, a breach of trust. *Elland v. Elland*, 1 Beav. 235; *Watkins v. Cheek*, 2 S. and S. 199. **Y**

(c) Where an action has been commenced for administration. *Lloyd v. Baldwin*, 1 Ves. Sen. 173. **Z**

(d) Where twenty years have elapsed from the death of the testator, and the real estate is charged with debts. *Molyneux v. White*, 13 L.R. 1n. 382. **A**

2.—“*In the absence of fraud....thereof*”—(Concluded).(8) **Trust for sale—Receipt.**

As a trust for sale is a joint office, the receipt must be signed by all the trustees who have undertaken to act. *Crewe v. Dicken*, 4 Ves. 97. **B**

(9) **Trustee who has disclaimed need not sign the receipt.**

The receipt need not be signed by a trustee who has disclaimed, for the effect of the disclaimer is as if the renouncing trustee had never been mentioned in the instrument. *Adams v. Taunton*, 5 Mad. 435; *Smith v. Wheeler*, 1 Vent. 128. **C**

(10) **Receipt by delegatee of trustee—if valid.**

Where A and B are trustees for payment of debts, and they convey the estate to C, upon like trusts, the purchaser of the estate cannot safely pay the purchase-money upon the receipt of C, because a trust cannot be delegated. *Lewin*, p. 648 (11th Ed.). **D**

(11) **Receipts by executor—Duty of vendees.**

The vendee from an executor is not bound to see to the application of the purchase-money. *Benny v. Redgard*, 1 Cox. 117. **E**

(12) **Effect of fraud on transactions by executors.**

Fraud and collusion will vitiate any transaction and turn it to a mere color, and so, if fraud be proved, the transactions would not stand. *Scott v. Tylor*, 2 Dick. 725. **F**

(13) **Fraud—What amounts to.**

Sale at a nominal price or fraudulent undervalue amounts to fraud. *Scott v. Tylor*, 2 Dick. 712. **G**

(14) **Sale by executor for payment of his own debt.**

Where the executor sells the estate for payment of his own debt, the vendee cannot rely on the sufficiency of the receipt from the executor. *Hill v. Simpson*, 7 Ves. 152; *Jones v. Stohwasser*, L.R. 16 Ch. D. 577. **H**

(15) **Payment to executor who will misapply.**

If a person owe money to a testator's estate, and be apprised that the executor means to misapply it, he cannot safely hand the money over to the executor on his receipt. *Eland v. Eland*, 4 M. and Cr. 427; *Stroughell v. Anstey*, 1 De G. M. and G. 648. **I**

(16) **Payment after long interval from testator's death.**

(a) If a great length of time has elapsed since the testator's death, in the absence of *mala fides*, the executor's receipt will, in general, be sufficient. *Charlton v. Earl of Durham*, L.R. 4 Ch. App. 433. **J**

(b) After twenty years since the testator's death, the presumption arises that the debts have been paid, and the onus is on the executors to show that the debts have not been paid. *Re Tanqueray-Willaume and Landan*, 20 Ch. D. 465. **K**

(17) **Religious trust—Power of one trustee to pass receipts binding others.**

In the case of religious or charitable trusts, it is permissible for one trustee to pass receipts for rents or dividends. If the other trustees had withdrawn the power of one of their members and informed the person, who has to make the payment, of such withdrawal of power, the receipt signed by one trustee might not be binding on the other trustees. 1 Bom. L.R. 667. **L**

Power to com- pound, &c. **43.** Two or more trustees acting together ¹ may, if and as they think fit,—

(a) accept any composition ² or any security for any debt or for any property claimed ;

(b) allow any time for payment of any debt ³ ;

(c) compromise, compound, abandon, submit to arbitration ⁴ , or otherwise settle any debt, account, claim, or thing whatever relating to the trust ⁵ ; and

(d) for any of those purposes, enter into, give, execute, and do such agreements, instruments of composition or arrangement, releases, and other things as to them seem expedient, without being responsible for any loss occasioned by any act or thing so done by them in good faith.

The powers conferred by this section on two or more trustees acting together may be exercised by a sole acting trustee when by the instrument of trust, if any, a sole trustee is authorized to execute the trusts and powers thereof.

This section applies only if and as far as a contrary intention is not expressed in the instrument of trust, if any, and shall have effect subject to the terms of that instrument and to the provisions therein contained.

This section applies only to trusts created after this Act comes into force

(Notes).

Scope of section.

This section seems to make the trustees a *quasi*-judicial body, and to exonerate them, like other arbiters or judges, from the consequences of a mistake made by them. In so doing, it does not relieve them from the judicial duties of observing legal formalities, making proper enquiries, seeking for the best evidence and acting conscientiously. *Ex parte Ogle*, 8 Ch. App 716. **M**

1.—“Two or more....acting together.”

(1) Trustee to act jointly with other trustees.

Where there are more trustees than one, none of them can act otherwise than jointly with others, for the authority of trustees is a joint, and not a several authority. *Ex parte Griffin*, 2 Gl. and J. 116. **N**

(2) Majority cannot bind minority.

A major number of trustees cannot bind a minority, nor the trust estate, in anything they may do. *Luke v. South Kensington Hotel*, 11 C.D. 121. **O**

I.—“Two or more....acting together”—(Continued).

(3) Act of one trustee—When binding on others.

When the act of one trustee is sanctioned by his co-trustees, it becomes binding on the trust estate, expressly or by implication. *Brazier v. Camp*, 63 L.J. Ch. 257. P

(4) Reason for the view that the trust is a joint office.

The nature of the office requires that the personal confidence reposed in all the trustees should be justified by the exercise by all of their judgment, and the taking by all of every reasonable precaution for the up-keep of the trust property. *Minch v. Cockrell*, 5 M. and Cr. 179, 214. Q

(5) Trust for conversion of the estate into money—Disagreement between trustees.

Where there is a trust for conversion of the property into money, and a discretionary power to postpone, then the property should be converted into money, except in cases where all the trustees agree for the postponement in the exercise of their discretion. *Re Roth (Goldberger v. Roth)*, 74 L.J. 51. R

(6) Receipt—to be joint.

(a) All moneys belonging to the trust estate should always be received by all the trustees, and receipt issued by all the trustees together. *Re Flower v. The Metropolitan Board of Works*, 27 Ch. D. 592. S

(b) The reason why more than one trustee is appointed is that they shall take care that the moneys shall not get into the hands of one of them alone; that they shall take care that the trust moneys are always under the care and control of every one of them; and they have no right, as between themselves and the *cestui que trust*, unless the circumstances are such as to make it imperatively necessary to do so, to authorise one of themselves to receive the moneys. (*Ibid.*) T

(7) Payment to one trustee—Notice of trust—Effect.

Where a person, knowing that he deals with trustees, pays moneys to one of them only, and where the recipient of moneys commits a breach of trust and thus causes loss to the estate, the payer is liable to pay it over again to all the trustees. *Clough v. Boud*, 3 My. and Cr. 490. U

(8) Investments to be in joint names.

All investments of trust moneys on mortgage or otherwise must be made in the joint names of all the trustees, except where the rules of a company do not allow shares to be registered in joint names. *Swale v. Swale*, 22 Beav. 584; *Consterdine v. Consterdine*, 31 Beav. 330. Y

(9) Proving of debts.

(a) All debts due to the trust estate must be proved by all the trustees, except under special circumstances. *Ex parte Phillips*, 2 Deac. 334; *Ex parte Smith*, 1 Deac. 385. W

(b) Though an acknowledgment of a debt may be made by one executor (if the acknowledgment is according to Lord Tenterden's Act), an acknowledgment by one trustee without his co-trustees would be insufficient. *Dick v. Fraser*, 1897, 2 Ch. 181. X

1.—“Two or more....acting together”—(Continued),

(10) Trustees to sue jointly.

Legal proceedings undertaken by the trustees should be instituted in the joint names of all the trustees, unless there are special circumstances, which are to be judged of in each particular case, and they should employ the same solicitor and incur no separate liability for costs. *Reade v. Sparkes*, 1 Moll. 8; *Gaunt v. Taylor*, 2 Beav. 346. **Y**

(10-a) Severance of trustees.

(a) If one of the trustees unnecessarily severs from his co-trustees, it is the duty of the Court to determine whether his severance was justifiable. *Williams v. Wright*, 1890, W.N. 50; *Crombach v. Isaac*, 1897, 1 Ch. 251. **Z**

(b) In matters of defence, if none of the trustees has a personal or beneficial interest conflicting with his duty as trustee, or if admissions made by some can be made by all, they ought not to sever. *Gaunt v. Taylor*, 2 Beav. 346. **A**

(c) Allegations made by one of the trustees, pleading his ignorance of the accounts of the trust administration, form no justifiable reason for severance, he should have required of his co-trustee to furnish him with the accounts, and so should have informed himself of all of them. *Hodson v. Cash*, 1 Jur. N.S. 864. **B**

(d) Even where one of the trustees is compelled to act and defend solely in consequence of the misconduct of his co-trustee, the plaintiff is not bound to pay more than one set of costs, which costs is allowable only to the innocent trustee. *Webb v. Webb*, 16 Sim. 55; *Prince v. Hire*, 27 Beav. 345. **C**

(e) Even mere residence in the country (but not with the other co-trustees), and even absence from the country, without other justifiable reasons, is no ground for separate defences. *Wiles v. Cooper*, 9 Beav. 298; *Farr v. Sheriffe*, 4 Ha. 528. **D**

(f) Where a false charge of misconduct and fraud is laid on a trustee, he is entitled to his separate costs, if he is at the same time defending for the protection of the trust estate. *Walters v. Woodbridge*, 7 C.D. 504; *Williams v. Wright*, 1890, W.N. 50. **E**

(11) Exceptions to joint action of trustees.

(a) RECEIPT OF RENTS.

(a) Where some of the trustees live far from the lands, a trustee, who is near the farm, may receive the rents, on behalf of all, while the other trustees have other business to attend to in connection with the trust. *Townely v. Sherborne*, Bridg. 35. **F**

(b) But, where one trustee thus receives the rents, and if he fails to apply them properly, the others should give notice to the tenants not to pay to him alone; if this course proves ineffectual, they should bring an action against him, failing which precaution, the others may be jointly and severally liable with the trustee in default. *Gouth v. Smith* 1872, W.N. 18. **G**

1.—“Two or more....acting together” —(Concluded).

(ii) RECEIPT OF DIVIDENDS.

(a) Dividends on stocks and shares may be received by one trustee on behalf of all. *Vide* S. 30 of Companies Act (1862). H

(b) The reason is that, by special Acts and Charters, and by S. 30 of the Companies Act (1862), the Bank of England, Railway, Insurance, and other Companies, have been empowered not to take notice of trusts. The Regulations of Companies provide for payment of dividends to the person whose name first appears in the register; and trustee's names being so registered, dividends may be paid to one of them only. I

(iii) REGISTRATION IN NAME OF A SINGLE TRUSTEE.

Where, by the rules of a company, shares specifically bequeathed to three trustees could be registered only in a single name, such shares could be properly registered in the name of a single trustee. *Consterdine v. Consterdine*, 31 Beav. 330. J

(iv) PAYMENT TO ONE, UNDER COURT'S ORDER.

In some cases of convenience, or under some special circumstances, the Court could order payment of dividends to one of several private trustees. *Re Clinton*, 8 W.R. 492; *Re Coulson*, 17 L.T. 27. K

(v) CHARITABLE TRUSTS.

A bare majority of charity trustees is empowered to deal with the trust estate and to institute and maintain actions and proceedings, and generally, in the case of public trusts, where the trustees are usually numerous, the majority of them can, so long as they do not act *ultra vires*, bind the general body. *Perry v. Shipway*, 4 D. and J. 353; *Ward v. Hynwell*, 3 Giff. 547; see, also, S. 13 of Charitable Trusts Act (1869). L

(vi) CASES OF MORAL NECESSITY.

In cases of moral necessity, such as that deeds, etc., should be held by one trustee, a single trustee is entitled to act alone. *Godefroi*, pp. 308, 309. M

2.—“Accept any composition.”

Acceptance of composition by trustee, *onus* on beneficiary to prove *mala fides*.

(a) Prior to the provision in S. 21 of the Trustee Act of 1893, it was for the trustee accepting any composition for any debt or claim to show that such act of his was clearly for the benefit of the trust estate. *Wiles v. Gresham*, 5 D.M.G. 770 and *Ex parte Ogle*, 8 Ch. 715. Now the *onus* lies upon the beneficiary to prove *mala fides* on the part of the trustee. See *Agnew*, p. 222, and *Underhill*, p. 288. N

(b) Under the section, the trustee could shift the *onus* of proof from him to the beneficiary, on the impeachment of any transaction entered into by him. *Griffith*, p. 101. O

3.—“Allow any time for payment of any debt.”

(1) Trust for payment of debts—Creation.

A trust for payment of debts may be created either by will or by act *inter vivos*. Lewin, p. 581 (11th Ed.). P

(2) Such trusts—generally irrevocable.

The existence of any debt is sufficient to support an assurance as valid and irrevocable as against the grantor. *Rice v. Rice*, 2 Drew. 84. Q

(3) When such trusts are revocable.

(a) Where a debtor, without communication with his creditors, and only from motives of personal convenience, vests an estate in trustees upon trust to pay his debts, the trustees are mere mandatories, and the deed confers no right upon the creditors, who are neither parties nor privies, and the debtor may, at any time, at his pleasure, revoke or vary the trusts, or call for the re-transfer of the property. *Corinthian v. Faith*, 4 DeG. and Sm. 552; *Walwyn v. Coutts*, 3 Sim. 14; *Acton v. Woodgate*, 2 M. and K. 492. R

(b) But if the trustee be himself a creditor, the debt forms a sufficient consideration on behalf of the creditor, and the deed is irrevocable. *Siggers v. Evans*, 5 Ell. and Bl. 367. S

(c) A deed containing a trust in favour of creditors, and an ultimate trust for the wife and children of the settlor, has been held to be irrevocable. *Godfrey v. Poole*, 13 A.C. 497 T

(4) What debts are to be paid.

(a) DEBTS AT DATE OF DEED OR DEATH.

If the trust be created by deed, then, unless a contrary intention be expressed, only such debts due at the time of the execution of the deed, or at the time when the testator died, will have to be paid. *Purfoy v. Purfoy*, 1 Vern. 28; *Loddington v. Kennel*, 3 Beav. 433. U

(b) DEBTS “AFFECTING THE ESTATE.”

Where, by deed, the settlor conveys all his real and personal property upon trust to pay all debts then owing by him, and which affected the estates thereby conveyed, the trustee should pay all bond debts, affecting the estate at the time. *Douglas v. Allen*, 1 Conn. and Laws, 367. Y

(5) Time-barred debts.

Where a testator gives a general direction for payment of his debts, such debts as have been barred by the statute of limitation cannot be revived—though the trustee or executor may have advertised for all creditors to come in and prove their debts. *Bunke v. Jones*, 2 V. and B. 275; *Jones v. Scott*, 1 R. and M. 255. W

(6) Trust for creditors who come in within certain time.

(a) Where there is a trust for payment of such creditors as shall come in within a year, a creditor, who delays beyond the year, is not prevented from taking advantage of the trust. *Dunch v. Kent*, 1 Vern. 260. X

(b) Where the trust was for the benefit of creditors, who should execute or “accede” within three months, it was held that a creditor, who had not acceded within the prescribed time, might claim the benefit of the trust. *Whitmore v. Turquand*, 1 J. and H. 444. Y

3.—“Allow any time for payment of any debt”—(Concluded).

(7) Executor can pay debts barred by time.

See *Lewis v. Rumney*, L.R. 4 Eq. 451. See also *Agnew*, p. 222.

(8) Payment of time-barred debts—Administrator.

(a) In England, an administrator is competent to pay a debt barred by time.
Combes v. Combes, L.R. 1 P. and M. 288.

(b) Under the old Limitation Act of 1871, it was held that the administrator-General of Madras may pay a debt, though barred by time, on the ground that the law of limitation barred merely the remedy but did not extinguish the right. 1 M. 267.

(c) Similarly, it has been held by the Calcutta High Court that an executor is not precluded from paying a debt barred by the statute 6 C. 340.

(d) *Quere.*—Under the present Limitation Act, whether the same principle would be applicable. See *Mitra's Limitation Act*, S. 28.

(9) Allowing time for any debt.

An executor or administrator may pay or allow any debt or claim on any evidence that he thinks sufficient. *Trustee Act* (1893), S. 21 (1).

(10) Power to allow time for payment—Executor.

Executors have a discretion whether they will press a debtor for payment, and will not be held liable for wilful neglect or default, if they have exercised their discretion honestly and fairly in giving time to a debtor, although loss may result from the delay. *Re Owens*, 47 L.J.N. S. 61.

4.—“Compromise, compound, etc... arbitration.”

(1) Power of executor to compromise co-executor's claim.

An executor has the power to settle the claims of his co-executor by means of a compromise. *Re Houghton*, 1 Ch. 622.

(2) Compromise—Assent of all.

(i) UNANIMOUS CONSENT.

(a) In the exercise of their discretionary powers, such as a power to accept a compromise, the consent of the trustees to the arrangement must be unanimous, since the majority cannot bind the minority or the trust property. *Luke v. South Kensington Hotel & Co.*, 11 Ch. D. 121.

(b) But *contra* where the single trustee, so acting on the mere assumption that his co-trustees would not dissent, enters into the compromise on behalf of the trust estate. *Lee v. Sankey*, 15 Eq. 204.

(ii) SUBSEQUENT ASSENT.

If one of the trustees effects the compromise, and if the remaining trustees knew of, and sanctioned and approved the particular act done by one of their body, the discretion may be taken to have been properly exercised, though they took no active part in the matter. *Messena v. Carr*, 9 Eq. 260.

4.—“*Compromise, compound, etc....arbitration*”—(Continued).

(3) **Power to compromise under Conveyancing Act and Lord Cranworth's Act—Nature of.**

The power to compromise given to trustees by S. 37 of the Conveyancing Act (1881), applies only to debts and is more restricted than that given by Lord Cranworth's Act. The power under this latter Act has been held to apply to claims as between the beneficiaries. *Weeden v. Warren*, 51 L.J. 561. K

(4) **Power to compromise under the Trustee Act (1893), S. 21—Nature of.**

S. 91 of that Act applies to executors, administrators and trustees, and it extends to trusts created as well before as after the passing of the Act. L

(5) **Compromise to be *bona fide*.**

(a) A compromise must be perfectly free from concealment or fraud, and if it is not, trustees who enter into it are guilty of a breach of trust, and the compromise will not be binding on the *cestus que trust* if the latter does not give his consent to, or acquiesce in, the transaction. *De Cordova v. De Cordova*, 4 A.C. 692. M

(b) Similarly the compromise will be null and void, if the compromise be in respect of a debt due by one of the trustees to the trust estate. (*Ibid.*) See *Cook v. Collingridge*, Jac. 607. N

(6) **Compromise to be entered into by all the trustees.**

(a) Upon the principle of the joint action of the trustees, a major number of them cannot enter into a compromise, in the exercise of a power or discretion given to them by the instrument of trust, so as to bind the rest. *Tempest v. Lord Camoys*, 21 C.D. 51. O

(b) If such a compromise is accepted by some only of the trustees, even acquiescence by the rest will not bind the trust estate or the *cestus que trust*. *Luke v. South Kensington Hotel Co.*, 11 C.D. 121. P

(7) **Compromise—when sanction by the Court necessary.**

A compromise of rights, in which an infant *cestus que trust*, or married woman restrained from anticipation, are interested, cannot be binding on them, unless the Court, being of opinion that the compromise will be for their benefit, sanctions it. *Brooke v. Lord Mortyn*, 2 D. J. and S. 373; *Welton v. Hill*, 25 L.J. Ch. 152; *Wall v. Rogers*, 9 Eq. 58. Q

(8) **Compromise, on behalf of infants—Lien of next friend.**

When the compromise entered into by the next friend of the infant is sanctioned by Court, the next friend and the solicitor have a lien for their costs on the infant's share under the compromise. *Re Wright's Trusts*, (1901) 1 Ch. 317. R

(9) **Compromise—when Court will approve of.**

(a) The Court will readily sanction a proper compromise entered into by the trustee on behalf of the *cestus que trust*, and will approve a scheme of compromise, when it is obviously for the benefit of infants. *Boyer v. Macleam*, (1903) 1 Ch. 848. S

(b) But, the Court will withhold its sanction, if parties *sui juris* decline to accept the terms. *Heasman v. Pearce*, 25 L.J. 121. T

(c) When once the compromise has been effected, although the residuary legatees were not consulted, the compromise will not be disturbed, if the compromise had been entered into honestly and with sufficient justifiable reasons. *Hawley v. Blake*, (1904) 1 Ch. 622. U

4.—“*Compromise, compound, etc., . . arbitration*”—(Continued).

(10) Approval of compromise—Absence of some of the persons interested.

Where, in proceedings concerning a trust, a compromise is proposed, and some of the persons interested in the compromise are not parties to the proceedings, but there are other persons having the same interest before the Court and assenting to the compromise, the Court, if satisfied that the compromise will be for the benefit of the absent persons, and that to require services on such persons would cause unreasonable expense or delay, may approve the compromise and order that the same shall be binding on the absent persons, and they shall be bound accordingly, except where the order has been obtained by fraud or non-disclosure of material facts. *Collingham v Sloper*, (1894) 2 Ch. 716, *The Saugosa, etc., Co. v. Collingham*, (1904) A.C. 159. Y

(11) Compromise by trustees—*Cestui que trust not sui juris*—Procedure.

Where persons not *sui juris* are interested, the trustees, desirous of obtaining the leave of the Court to enter into the compromise, may do so by an originating summons, or by a petition, or sometimes by a mere motion. *Lappatt v. Holley*, 1 Beav. 423. W

(12) Compromise to be assented to by next friend of minor *cestui que trust*.

The compromise must be assented to by the next friend or guardian, and it should be supported by the affidavit of the solicitor of the infant, or the opinion of the Counsel for the infant, showing that the terms of the compromise are beneficial; for, the Court has no jurisdiction to force a compromise upon infants against the opinions of their advisers. *Re Birchell, Wilson v. Birchell*, 16 C.D. 41. X

(13) Compromise between parties *sui juris*—effected through solicitor—when allowed.

(a) Where parties interested under a will are *sui juris*, and a compromise is arrived at between them through the intervention of a solicitor as agent for all parties, the compromise will not be disturbed, if the solicitor had fully explained to the parties their legal rights under the compromise. *Re Roberts, R v. R*, 1905, 1 Ch. 751. Y

(b) But if the solicitor lacks in such duty, or if he misleads a party by taking an erroneous view of the facts or the law, then such person could set aside the compromise. (*Ibid.*) Z

(14) Power to compromise—Position as trustee attacked.

Obiter—It is doubtful whether the trustee has power to compromise, at the expense of the trust estate, a suit in which his own position as trustee is attacked. 6 M L T 143 (152), see, also, *Graham v. McCoshin*, (1901) 1 Ir. R. 404, and cases cited therein at p. 412. A

(15) Power to executor to compound.

A power given to an executor to compound would not include an administrator, who might be merely a creditor or some one not necessarily a proper person to be entrusted with so large a discretion. *Clay v. Jetley*, 16 Ch. D. 3. B

4.—“**Compromise, compound, etc., . . . arbitration**”—(Concluded).

(16) **Trustees referring to arbitration, not personally liable.**

Trustees cannot be held personally liable for the consequences of their having referred matters to arbitration. *Davis v. Ridge*, 3 Esp. 101. C

(17) **Cls. (d), (c) of the section.**

See S. 21 of the Trustee Act (1893), which is merely a re-enactment of S. 37 of the Conveyancing and Law of Property Act (1881). See, also, (Underhill), p. 288 D

5.—“**Otherwise settle . . . debt . . . trust.**”

(1) **Scope of the expression “debt, account, claim or thing whatever.”**

These words extend to the claim of legatees. *Re Warren*, 51 L.J.N.S. 561.

These words seem to enable executors, where a residue consists of a great variety of securities, to appropriate some to one legatee and some to another, making the distribution at the market price of the day. But where infants are concerned who cannot give a personal consent, it would not be safe to do so without the advice or sanction of the Court. *Paterson v. Paterson*, L.R. 3 Eq. 111. E

(2) **Admission of creditor's claims—Discretion.**

A discretion is given to trustees to admit or exclude such creditors as they shall think proper. The Court will have control over the trustees, and see that the trustees do not exercise the discretion, so as to prejudice the rights of creditors unreasonably, but, in the absence of fraud on the trustee's part, the Court will abstain from interfering with the trustees. *Nunn v. Wilsmore*, 8 J.R. 521; *Cosser v. Radford*, 1 DeG. J. and S. 585. F

(3) **Creditors to be paid before legatees.**

As regards the administration of assets, creditors take precedence of legatees, and the creditors should be paid before the claim of the legatees is satisfied. *Greaves v. Powell*, 2 Vern. 248, *Whitton v. Loyd*, 1 Ch. Ca. 275. G

(4) **Creditors to be paid *pari passu*.**

Amongst the creditors themselves, no distinction is maintained, and the Court acts upon the principle that “Equality is Equity,” and creditors will be paid in rateable proportions. *Child v. Stephens*, 1 Vern. 101; *Woles Stoncroft v. Long*, 1 Ch. Ca. 32. H

(5) **Power to release or compound.**

(a) A trustee may, sometimes, release or compound a debt. *Blue v. Marshall*, 3 P.W. 381. *Ratchffe v. Winch*, 17 Boav. 216. I

(b) But where a trustee releases or compounds a debt without some sufficient ground in justification, or if he sell the debt for a grossly inadequate consideration, he would be answerable to the *cestui que trust* for the amount of the *devastatit*. *Tevon v. Bush*, 1 Vern. 342; *Re Alexander*, 13 Ir. Ch. Rep. 137. J

(6) **Power of release—Mortgages.**

Where a mortgagor is ready to pay off the debt on a transfer of the security if the trustees release part of the land, and where the remainder is still an ample security and the mortgage is still a beneficial one, the trustees may release. *Whiteney v. Smith*, 4 Ch. App. 513. K

44. When an authority to deal with the trust-property is given to several trustees, and one of them disclaims or dies¹, the authority may be exercised by the continuing trustees², unless from the terms of the instrument of trust it is apparent that the authority is to be exercised by a number in excess of the number of the remaining trustees.

Power to several trustees of whom one disclaims or dies.

(Notes).

1.—“One of them disclaims or dies.”

(1) Disclaimer by deed.

Disclaimer may be evidenced by deed, which is the most effectual, and, therefore, the most prudent course. *Stocey v. Elph*, 1 M. and K. 199 **L**

(2) Form of the deed by which disclaimer is made—English Law.

The form of the deed is a deed-poll reciting the settlement or will under which the trusts arise, and the refusal, by the person disclaiming, of the grant or devise made to him in trust, followed by a renunciation and disclaimer of the property so granted or devised, and all trusts, powers, and authorities vested in him. The deed may, however, expressly reserve any beneficial interest which the disclaiming trustee may take by virtue of the settlement or will. *Godefroi*, p. 23. **M**

(3) Disclaimer by conveyance.

(a) The deed, by which the trustee disclaims the office, may also take the form of a conveyance to the other trustees. *Nicholson v. Wordsworth*, 2 Swans 372; *Sharp v. Sharp*, 2 B. and A. 405 **N**

(b) If the deed specifically shows an intention to disclaim, and if the trustee has not done anything inconsistent with such an intention, then the deed will be construed according to that intention. (*Ibid.*) **O**

(4) Disclaimer may be by conduct.

Where the conduct of the person, who has been appointed a trustee under a settlement, is such as to show that he has neither accepted, nor acted in the trusts, such conduct on his part amounts to a disclaimer. *Stocey v. Elph*, 1 M. and K. 199, *White v. Mc Dermot*, I.R. 7 C.L. 1. **P**

(5) Disclaimer at the Bar.

A disclaimer may be made by counsel at the Bar, so that the Court, in the exercise of their jurisdiction, may appoint a new trustee. *Forster v. Dawber*, 1 Dr. and Sm. 172. **Q**

(6) Disclaimer by word of mouth.

A mere declaration by word of mouth may amount to a sufficient disclaimer. *Bingham v. Clanmorris*, 2 Moll. 253. **R**

(7) Disclaimer by writing.

The disclaimer may also be effected by a written declaration, e.g., a letter, etc. (*Ibid.*) **S**

I.—“One of them disclaims or dies”—(Continued).

(8) Renunciation of Probate may amount to disclaimer.

(a) Where, under a settlement, a testator appoints trustees, and at the same time appoints them also as his executors, and where they do not apply for probate and do not execute any deed of disclaimer, the fact that the executors have renounced the probate is evidence of an intention on their part to disclaim the trusts. Such renunciation is treated as evidence of disclaimer after the expiry of three years. *Roberts v. Gordon*, 6 C.D. 531, *Mc. Kenna v. Eager*, I.R. 9 C.L. 79. T

(b) It is usually the case that, after a sufficient time has expired, the renunciation of probate by an executor who is also a trustee is regarded as equivalent to a disclaimer. *Mc. Kenna v. Eager*, I.R. 9 C.P. 79. U

(9) Trust of real and personal estate—Trust for sale of real estate—Renunciation.

(a) Where a trust of real and personal estate is combined with a trust for sale of the real estate so as to make a mixed fund, to be applied with the personal estate in the payment of debts, legacies, and testamentary expenses, and where the trustee-executor renounces probate, such renunciation is conclusive evidence of disclaimer. *Roberts v. Gordon*, 6 Ch. D. 534. Y

(b) “If the trustee renounces execution of the will as to the personal estate, he cannot carry out the trust as to the payment of the debts, legacies, and testamentary expenses, as that is the executor’s business, and the person who takes out administration must perform it. He cannot get rid of a part of his trust in this way. In other words, it is evident that he intends to have nothing to do with the will, that he intends, in fact, to disclaim all the trusts.” (*Ibid.*) W

(10) Partial disclaimer—if possible.

(a) As the office of trustee cannot be disclaimed in part, a disclaimer of the trusts as to a portion only of the trust property, even though the other portion not disclaimed be situate abroad, is ineffectual. *Re Lord and Fullerton*, 1496 1 Ch. (C.A.) 228. X

(b) “It is not competent for any trustee to say ‘I will attend to some of the trusts, and I will not attend to others.’ He must disclaim *in toto*, or he remains a trustee as to all its matters not whether the disclaimer relates to all property within the jurisdiction, provided there be other trust property not covered by the disclaimer.” (*Ibid.*) Y

(11) Disclaimer of office—Effect of, on estate.

Where a trustee disclaims his office as such, he is considered to have disclaimed the estate also. And where new trustees come in subsequently, the trustee who has disclaimed is not required in law to convey the legal estate to the new trustees, or to the continuing trustee, for he has nothing to convey. *Birchell v. Ashton*, 40 C.D. 436. Z

(12) Disclaimer—Effect of the instrument.

Where a trustee disclaims the estate, the grant or devise becomes void. *Townson v. Tickell*, 3 B. and Ald. 31. A

I.—“One of them disclaims or dies”—(Continued).

(13) Disclaimer should be made without delay.

(a) The disclaimer should not be unreasonably delayed ; but, even if there has been great delay in disclaiming the office, it will not fix the trustee with liability, if his acts, in the meantime, have not been inconsistent with an intention not to accept the trusts. *Noble v. Meymott*, 14 Beav. 471, *Doe v. Harris*, 16 M. and W. 517. **B**

(b) There is no rule that a trustee must execute a disclaimer within any particular time. So where there has been a delay of 16 years in disclaiming the office on the part of a trustee, it was held to be a good disclaimer, if the interval can be so explained as to rebut the presumption of the trustee having accepted the trust. *Noble v. Meymott*, 14 Beav. 471. **C**

(c) Where a person knows that he has been appointed a trustee and keeps quiet for a long period, the question whether such acquiescence on the part of the trustee amounts to his accepting the office or not is a question of fact which the Courts should decide. *Paddon v. Richardson*, 7 De. G.M. and G. 563, *James v. Frearson*, 1 Y. and C.C.C. 370. **D**

(14) Disclaimer by executor—Effect of, on powers of sale.

Where an executor appointed under a will renounced probate, he may exercise a power of sale given to him by name, and not vested in him *virtui officii*. *Madden v. Madden*, 23 L.R. Ir. 167, Sugden. V. and P. 118. **E**

(15) Disclaimer by executor—Discretionary power.

Where an executor renounces probate, he cannot exercise a discretionary power in the nature of a trust, such as a power of selecting charities, and distributing the residue amongst them. *Attorney-General v. Fletcher*, 5 L.J. Ch. 75 **F**

(16) Disclaimer—Effect of, on the real estate.

Where the trustees disclaim the real estate, the disclaimer has the effect of causing the legal estate to devolve upon the heir of the settlor, who cannot disclaim it. *Roberts v. Gordon*, 6 C.D. 531 ; See *Humphrey v. Morse*, 2 Atk. 408. **G**

(17) Disclaimer by trustee—Effect of, on sale by administrator.

Where all the trustees of leaseholds disclaimed and renounced probate, an administrator, with the will annexed of the testator, could sell the estate under a discretionary power of sale given to him, and a purchaser in such sale will have a good title. *Wyman v. Carter*, 12 Eq. 309. **H**

(18) Disclaimer of powers—Effect of.

(a) Where a trustee disclaims the powers given to him, the power may be exercised by the other or others, or the survivors or the survivor of the others, unless the contrary is expressed in the instrument creating the power. S. 6 of Conveyancing Act, (1882). **I**

(b) But a trustee cannot disclaim a particular power so as to vest the exercise of it in his co-trustee, he himself continuing a trustee for other purposes. *Re Eyre*, 49 L.J.N.S. 259. **J**

(c) Where trusts include powers, whether appendant or in gross, and where the trustee disclaims the powers, the disclaimer must be by deed. (*Ibid.*) **K**

1.—“One of them disclaims or dies”—(Concluded).

(19) Married woman (trustee)—Disclaimer.

Married woman (who had been appointed trustee) may disclaim estates in lands in England of any tenure, by deed acknowledged. 8 and 9 Vic., C. 186, S. 7. **L**

(20) Disclaimer of protectorship.

Where the trustees are appointed protectors of the settlement, and they intend to disclaim the protectorship, the formality to be observed in such cases is that the deed of disclaimer must be enrolled in chancery. 3 and 4 W.C. 74, S. 92. **M**

(21) Chattels—Form of disclaimer.

Where the trust estate is only a mere chattel interest, a disclaimer of declaration by word of mouth will be sufficient to divest the legal estate from the trustee. *Butler and Bahers' Case*, 3 Rep. 26 b, 27 a; *Smith v. Wheeler*, 1 Vent. 130. **N**

(22) Disclaimer by trustee—His subsequent action as agent in the matter of trust.

Where a trustee renounces the trust, whether by express disclaimer or by conduct amounting to it, he may assist as agent in the management of the estate, without being subject to any responsibility. *Dove v. Everard*, 1 R. and M. 231; *Harrison v. Graham*, 3 Hills M.S.S. 239. **O**

(23) Disclaimer at the bar—Costs.

Where a trustee disclaims at the bar, he is entitled to his costs as between party and party only. *Bulkeley v. Fglington*, 1 Jur. N. S. 994. **P**

(24) Costs of advice as to disclaimer.

Where a person is named as trustee without his authority, he is entitled to take advice from a solicitor as to the execution of a disclaimer and the costs which he incurs on that account should be defrayed from the trust funds. *Re Tyrone*, 7 Beav. 496. **Q**

(25) Disclaimer to be within a reasonable time.

- (a) The disclaimer should be made within a reasonable period, having regard to the circumstances of the particular case. *Re Lord and Fullerton*, (1896) 1 Ch. 228. **R**
- (b) Where a trustee, with notice of the trust, has indulged in a passive acquiescence for some years, he will be presumed to have accepted it, in the absence of any satisfactory explanation. *Wise v. Wise*, 2 J. and Lat. 403 *Uniacke*, 1 J. and Lat. 1. **S**

(26) Renunciation by executor.

Where an executor renounces his office as executor by an instrument under seal, the renunciation would operate as a disclaimer of his powers annexed to the office of executorship. *Re Fisher and Haslett*, B.L.R. IV. 546. See S. 6 of Conveyancing Act (1882). **T**

2.—“The authority....continuing trustees.”

(1) Disclaimer—How operates on title of remaining trustees.

Where a trustee disclaims the office, the title of the remaining trustees is complete *ab initio*, because, the disclaimer operates retrospectively. *Peppercorn v. Wayman*, 5 DeG. and Sm. 290. **U**

2.—“The authority....continuing trustees” —(Concluded). •

(2) Effect of disclaimer by a trustee.

- (a) The —, where there is a co-trustee, is to vest the whole legal estate in the co-trustee. *Small v. Marwood*, 9 B. and C. 299; *Crewe v. Dicken*, 4 Ves. 100. **Y**
- (b) On the disclaimer or death of one of the several trustees empowered to manage the trust, it is competent for the continuing trustees or trustee to exercise the powers. *Crewe v. Dicken*, 4 Ves. 97; see *Earle Cranville v. M'Neile*, 7 Hare, 156. **W**
- (c) As was decided in *Hawkins v. Kemp*, 3 East. 410, where two or more persons are appointed trustees, and all of them, except one, renounce, the trust may be executed by that one. *Cooke v. Crawford*, 13 Sim. 96. **X**
- (d) The trust-estate generally vesting in the trustees as joint-tenants, on the death of one of them, it survives to the co-trustees (*Law v. Debeham*, 11 Hare 188; see *Watson v. Pearson*, 2 Ex. 581); unless a contrary intention clearly appears from the instrument of trust. *Foby v. Wontner*, 2 J. and W. 245; *Jacob v. Lucas*, 1 Beav. 436. **Y**

(3) Disclaimer—Effect of, on powers.

If a power be given to several trustees and one of them disclaim the trust, the power may be exercised by continuing the trustees or trustee. *Earl Granville v. M'Neile*, 7 Hare 156. **Z**

(4) Survivorship of trust.

- (a) A bare authority given to several persons, if coupled with an interest, survives to the remaining persons, on the death of any one of them. *Butler v. Bray*, Dyer 189 b, *Attorney-General v. Clegg*, 1 Atk. 356. **A**
- (b) A power or trust given to, or vested in two or more trustees jointly, may, subject to any direction to the contrary, be exercised or performed by the survivor or survivors of them for the time being. S. 22, Trustee Act, 1893. **B**

(5) Power of appointment of new trustees in settlement—Survivorship of trust. •

- (a) Even if there be a provision in the instrument of the trust for restoring the original number of trustees by new appointments, on the death of one of them, the trust could be exercised by the survivors. *Doe v. Godwin*, 1 D. and R. 259, *Warbuston v. Sandys*, 14 Sim. 622. **C**
- (b) The death of one of several trustees in the life-time of the testator does not prevent those who survive him from exercising the power. *Ex-parte Hadley*, 5 De G. and Sm. 67. **D**
- (c) Where one of three trustees disclaimed and another died, the third was held entitled to exercise the power given to the surviving trustee. *Cafe v. Bent*, 5 Ha. 24. **E**
- (d) But a trustee who disclaims cannot exercise the power, unless he has reserved, by his disclaimer, the right to exercise it. *Ex-parte Hadley*, 5 De G. and Sm. 67. **F**

(6) Devolution of trust office—Death of survivor.

Upon the death of a last surviving trustee, the trust-property devolves on his legal personal representative, and is incapable of being devised or bequeathed. 44 and 45 Vic., C. 41 (1881). **G**

45. Where a decree has been made in a suit for the execution of a trust, the trustee must not exercise any of his powers, except in conformity with such decree, or with the sanction of the Court by which the decree has been made, or, where an appeal against the decree is pending, of the Appellate Court.

Suspension of trustee's powers by decree 1.

(Notes).

1.—“Suspension of trustee's powers by decree.”

(1) Decree in administration suit, effect of, on trustee's powers.

(a) SUSPENSION OF POWERS.

After a decree has been passed in a suit for administering the trust, the power of the trustees to act on their own responsibility is suspended, so that, when they have to take steps in the management, they will have to get the sanction, either of the original Court, or of the Appellate Court during the pendency of the appeal. *Mitchelson v. Piper*, 8 Sim. 64; see *Eastwood v. Clarke*, 23 Ch. D. 131. **H**

(b) TRUSTS FOR SALE.

After the decree for the execution of the trust, a trustee for sale cannot execute his power to sell without the permission of the Court. *Walker v. Smallwood*, Amb. 676. **I**

(c) INSTITUTION AND DEFENCE OF SUITS.

Before commencing or defending any suit subsequent to the administration suit and the decree therein, the trustee must obtain the leave of the Court. *Jones v. Powell*, 4 Beav. 96; see *Agnew*, p. 232. **J**

(2) Injunction (before judgment), and appointment of Receiver in administration suit, effect of.

(a) Where a judgment has been given for the execution of the trust by the Court, or where (before judgment), an injunction has been granted, or a Receiver appointed, the trustee can only exercise his powers with the Court's sanction. *Shewen v. Vanderhorst*, 2 R. and M. 75; *Minor v. Battison*, 1 App. Cas. 428. **K**

(b) But the mere issue of a writ for administration does not affect the trustee's powers. *Bedry v. Gibbons*, 8 Ch. App. 747. **L**

(3) Administration action—Discretionary power in trustees—Non-interference by Court.

After the passing of a decree in an administration action, although the sanction of the Court should be obtained, where the trustees have absolute and uncontrollable discretionary power given to them under the settlement, the Court will not interfere with such discretion, so long as the trustees exercise the same in good faith. *Gisborne v. Gisborne*, 2 A. C. 300. **M**

(4) Executor's duties after administration suit.

(a) A decree for administration does not absolve the trustees from the performance of their duties. *Garner v. Moore*, 3 Drew. 277. **N**

I.—“*Suspension of trustee's powers by decree*”—(Continued).

- (b) So, where, after judgment in an administration suit, an executor allowed a policy of insurance to drop without any valid reasons, he was held liable. (*Ibid.*) O

(5) **Execution of repairs after administration action**

Where the estate of the trust-property is such that repairs should be executed to maintain it in good condition, the trustees, after judgment in a suit for execution of trust, must apply to the Court to get the requisite sanction. *Mitchelson v. Piper*, 8 SAn. 64. P

(6) **Investment of trust funds.**

Nor could they make any investments of the trust funds, without the Court's leave, after judgment. *Bethell v. Abraham*, 17 Eq. 24. Q

(7) **Trustee's action without sanction after judgment—His liability.**

(a) After judgment for general administration of the trust has been passed, where the trustee acts without previously obtaining the approval of the Court, the trustee will be personally liable for any loss resulting from such action on his part. *Berry v. Gibbons*, 8 Ch. App. 747. R

(b) Where, by acting independently of the Court, expenses have been incurred, which might have been avoided had the trustees applied to the Court, they may be ordered to bear them personally. *Attorney-General v. Clack*, 1 Beav. 467, See *Cafe v. Bent*, 249. S

(8) **Transactions with third parties by trustee after judgment—Title of third parties.**

(a) Where a trustee enters into transactions in respect of personal estate with third parties, who have no notice of the judgment, the trustee could confer a good title on them, although the action has been registered as *a lis pendens*. *Berry v. Gibbons*, 8 Ch. App. 717. T

(b) But *contra*, where the transaction is in respect of real estate, where *lis pendens* is duly registered. *Underhill*, p. 294 (6th Ed.). U

(9) **Payment of money into Court—Trustee's powers.**

(a) Where, under S. 42 of the Trustee Act (1893), the trustees have paid the money into Court, they cannot exercise any of their powers. *Re Nettlefold*, 59 L.T. 315. V

(b) As soon as money is paid into Court, it has the effect of making the trustees retire from their office and of compelling them to relinquish the judgment and discretionary power confided to them by the settlor. (*Ibid.*) W

(10) **Order for general administration action—When given.**

(a) If any one interested in a residuary estate instituted a suit to administer the estate, he had the right to require, and, as a matter of course, to obtain, the full decree for the administration of the estate. *Jones v. Blake*, 29 Ch. D. 913. X

(b) Where there are questions which cannot properly be determined, without some accounts and enquiries or directions which would form part of an ordinary administration decree, then the right of the party to have the decree or order is not taken away, but the Court may restrict the order simply to those points which will enable the question, which requires to be adjudicated upon, to be settled. *Rules of the Supreme Court*, 1883, O. LV, r. 10. Y

1.—“Suspension of trustee's powers by decree”—(Concluded).

(11) Costs of administration action.

- (a) The costs of, and incident to, all proceedings in the Supreme Courts, including the administration of trusts, shall be in the discretion of the Court or Judge. Rules of Supreme Court, O. XLV, r. 1. **Z**
- (b) Where a party applies for judgment in respect of a question, stating that that question is a substantial one, which must necessarily be adjudicated upon, and it subsequently turns out either that the representation of the applicant was not correct or that the applicant was entirely wrong in his contentions, the Court can order the person who gets the judgment to pay the costs of all the proceedings consequent upon his unnecessary and vexatious application to Court. *Jones v. Blake*, 29 Ch. D. 913. **A**

(12) When administration action—Necessary.

- (a) Where there were several disputes as to the proper beneficiaries, out of which disputes several actions had sprung, to all of which the trustee was a necessary defendant, an action for general administration will be granted for the trustee, in order to relieve him from the trouble and annoyance. *Barker v. Peile*, 2 Dr. and Sm. 340. **B**
- (b) The Court will not necessarily order general administration, because a testator has directed his trustees to institute an action for it. *Re Stocken Jones v. Hawkins*, 38 Ch. D. 319. **C**

* (13) Payment of debts by executor.

- (a) When powers of the executor have been suspended by commencing an administration action, he cannot pay debts of the testator, without Court's leave. *Widdowson v. Duck*, 3 Mar 494, *Bethell v. Abraham*, L.R. 17 Eq. 24, *King v. Ral*, L.J. 27th May, 1858, *Irby v. Irby*, 24 Beav. 525. **D**
- (b) But, after a suit has been instituted, an executor can sign a valid receipt for any part of the testator's personal estate. Lewin, p. 730 (11th Ed.). **E**
- (c) Where an administration action has been heard, and any subsequent further consideration has not been reserved, but general liberty to apply has been given, it is competent to the trustees to exercise their powers without obtaining Court's sanction. *Re Mansel*, 54 L.J.N.S. Ch. 883. **F**

CHAPTER V.

(OF THE DISABILITIES OF TRUSTEES.

46. A trustee who has accepted the trust¹ cannot afterwards renounce² it, except (a) with the permission of a principal Civil Court of original jurisdiction, or, (b) if the beneficiary is competent to contract, with his consent³, or (c) by virtue of special power in the instrument of trust.
- Trustee cannot renounce after acceptance.

(Notes).

1.—“ A trustee who has accepted the trust.”

(1) What amounts to acceptance.

A trust is considered to have been accepted by words and acts of the trustee, from which the acceptance of the trust may be inferred with reasonable certainty (Powell's Trust Act), 2nd Ed., p. 222. **G**

(2) Non-disclaimer within a reasonable time presumes acceptance.

A trustee, who does not disclaim the office, within a reasonable time from his acceptance, is presumed to have accepted. (*Ibid.*) **H**

2.—“ Cannot renounce it.”

(1) Rule embodied in the section.

(a) It is a rule, without any exception, that a person who has once undertaken the office, either by actual or constructive acceptance, cannot discharge himself from liability by a subsequent renunciation. *Doyle v. Blake*, 2 Sch. and Ref. 231, 245; *Manson v. Baillie*, 2 Macq. H.L. Cas. 80. **I**

(b) It is not possible for a trustee to renounce his position as such, by any act of his own, till he has discharged the duties entrusted. *Chalmes v. Bradley*, 1 J. and W. 68. **J**

(2) Executor—Renunciation.

(a) An executor has no right to renounce, after he has acted as such. *Doyle v. Blake*, 2 Sch. and Ref. 231. **K**

(b) In a case in which X was named executor and acted on behalf of some particular legatees, but disclaimed the intention of interfering generally, and then renounced, and Y obtained letters of administration with will annexed and possessed himself of assets, and died insolvent, held, that X, having acted, could not afterwards discharge himself. Held also that he was responsible for the *devastavit* committed by Y. *Doyle v. Blake*, 2 Sch. and Ref. 231. **L**

3.—“ Except with his consent.”

(1) Consent of all beneficiaries necessary for renunciation.

In cases where there are more beneficiaries than one, the trustee should renounce with the consent of all the beneficiaries interested in the estate being *sui jure*. *Doyle v. Blake*, 2 Sch. and Ref. 245. **M**

(2) Trustee liable to convey estate even after beneficiary recovers on the bond.

Where a trustee has given a bond for the due execution of the trust and the cestui que trust has recovered on the bond, if the latter subsequently takes proceedings to compel a conveyance of the trust estate, the Courts will decree a conveyance, subject to an allowance to the trustee of the penalty recovered upon the bond with interest. • *Moorecroft v. Dowding*, 2 P. Wms. 314. **N**

• **47.** A trustee cannot delegate ¹ his office or any of his duties either to a co-trustee or to a stranger, unless (a) the Trustee cannot delegate. instrument of trust so provides ², or (b) the delegation is in the regular course of business, or (c) the delegation is

necessary³, or (d) the beneficiary, being competent to contract consents to the delegation.

Explanation.—The appointment of an attorney or proxy to do an act merely ministerial, and involving no independent discretion, is not a delegation⁴ within the meaning of this section.

Illustrations.

(a) A bequeaths certain property to B and C on certain trusts to be executed by them or the survivor of them or the assigns of such survivor. B dies. C may bequeath the trust property to D and E upon the trusts of A's Will.

(b) A is a trustee of certain property with power to sell the same. A may employ an auctioneer to effect the sale.

(c) A bequeaths to B 50 houses let at monthly rents in trust to collect the rents and pay them to C. B may employ a proper person to collect these rents.

1.—“A trustee cannot delegate his office.”

(1) Rule involved.

(a) The office of trustee, being one of personal confidence, cannot be delegated. The rule is an application of the maxim “*Delegatus non potest delegare.*” Lewin, p. 277, 11th Ed. **O**

(b) Trustees, who undertake the management of property, have no right to shift their duty on other persons, and in case they do so, they are subject to responsibility towards their beneficiaries. *Turner v. Courtney*, 5 Beav. 517. **P**

(c) The settlor had confidence in his capacity and integrity, and the *cestui que trust* looks upon him alone to exercise his prudent discretion. *Luke v. S. Kensington Hotel Co.*, 11 Ch. D. 12. **Q**

(d) A person has no power to appoint a trustee of property of which he himself is the trustee, and, therefore, a deed creating a trust executed by such a person is void *ab initio*. 12 O. C. 236. **R**

(2) Discretionary trust—Delegation.

A discretionary trust can no more be delegated to a co-executor or co-trustee than to a stranger. *Knight v. Lord Plymouth*, 3 Atk. 480. **S**

(3) Delegations—Sales, etc.

(a) In the case of sales or purchases or investment, he has himself to choose the valuer or broker, and not to delegate that duty to the solicitors, or even to one of his co-trustees. *Robinson v. Harkin*, (1896) 2 Ch. 415. **T**

(b) He can seek advice of others as to the qualifications of the broker or valuer, but in selecting one, he has to exercise his own judgment. *Fry v. Tapson*, 28 Ch. D. 268. **U**

(4) Delegation—Leases.

He cannot delegate the execution of the trust to lease property. For the fitness of the lessee as well as his responsibility, the adequacy of rent, the length of the period, the conditions to be embodied in the lease, are all matters requiring knowledge and prudence. *Robson v. Flight*, 4 D.J. and S. 614. **Y**

1.—“A trustee cannot delegate his office”—(Concluded).

(5) If he delegates he is responsible.

- (a) A trustee confiding the application of the trust-fund to the care of a stranger is personally responsible for any loss that may result. *Adams v. Clifton*, 1 Russ. 297. **W**
- (b) Nor can he so confide to the care of a co-trustee. *Faves v. Hickson*, 30 Beav. 236. **X**
- (c) Nor can he do so to his own legal adviser. *Chambers v. Menchin*, 7 Ves. 186. **Y**

(6) Religious trust—Assignment—Delegation—If either valid.

- (a) A holding land on trust to supply a temple with rice, etc., out of the income of the land, placed B in possession of it under a lease, and subsequently demised to X for nine years under an instrument, which provided that X should collect the income, pay part of it to the executant of the instrument A, and with the rest, should perform the trusts mentioned above. In a suit for rent brought by X against B, the latter denied the former's title, questioning the validity of the instrument of demise. *Held* that the instrument was valid, as it merely appointed X an agent and it did not amount to an assignment of the trust. 16 Mad. 73. **Z**
- (b) *Obiter*.—It might be a question whether, if the transfer were permanent and absolute, it could be upheld. 16 M. 73 (75). **A**

2.—“Unless the instrument of trust so provides.”

(1) Trustee not liable if he follows testator's directions.

A trustee is not answerable if he merely follows the testators' directions. *Kilbee v. Sneyd*, 2 Moll. 195 (199). **B**

(2) Liability of executor.

Similarly an executor cannot be answerable, if he hands over money which he has no legal right to retain. *Davies v. Spurling*, 1 R. and M. 64. **C**

3.—“Unless the delegation . . . business . . . necessary.”

(1) What amounts to moral necessity.

Moral necessity exists where the trustee acts as prudently for the trust as he would have done for himself, and according to the usage of business—(e.g.) where a trustee appoints rents to be paid to a banker at that time in credit and the latter afterwards breaks, he is not answerable. (*Ibid.*) **D**

(2) Trustees could act through agents in cases of moral necessity.

- (a) Trustees and executors may justify their administration of the estate through the agency of others, where there exists a moral necessity for it. *Ex parte Belchier*, Amb. 219. **E**
- (b) Lord Watson said—“Whilst trustees cannot delegate the execution of the trust, they may, as was held in *Speight v. Gaunt*, avail themselves of the services of others, wherever such employment is according to the usual course of business. *Leahey v. Whiteley*, L.R. 12 A.C. 727 at 734. **F**

3—"Unless the delegation....business....necessary"—(Continued).

- (c) A trustee would be protected, if the delegation is to such persons as a man of ordinary prudence would so delegate if the property were his own.
Re Bird, L.R. 16 Eq. 203. **G**

(2-a) **Instances of moral necessity.**

- (a) Where the property is of a nature (stocks or shares) which a trustee cannot sell personally, he can appoint stewards, bailiffs, solicitors, auctioneers, accountants, and other skilled persons, for there is a moral necessity for so doing. *Whiteley v. McGregor*, 12 A.C. 727. **H**
- (b) If the property is in a foreign country, he can delegate this to an attorney, this being a case of moral necessity. *Stuart v. Norton*, 14 M.P.C. 17. **I**

(3) **Though trustee could delegate in sales, he cannot give control over purchase-money.**

Although he could delegate the sale or purchase transaction to others, he cannot give them control over the purchase-money. *Bostok v. Floyer*, 1 Eq. 29. **J**

(4) **Where numerous debts to be collected he could appoint a debt collector.**

If there are numerous small debts to be collected, he can appoint a debt collector. If, in doing so, the money is lost by the latter's insolvency, the trustee is not responsible. *Brier v. Emson*, 26 Ch. D. 238. **K**

(5) **Trustee need not take security from agent.**

A trustee need not take any security from the agent, for the reason that such requisition would cause hindrance to trust business. *Ex parte Belcher*, Amb. 218 (at 220) **L**

(6) **How trust money to be sent to foreign place.**

If the trust money is to be sent to a foreign place, the trustee may do so through the medium of a responsible Bank, or he may take bills drawn by a person of undoubted credit and payable at the place whither the money is to be sent, but then the money is to be paid into the accounts of the trust estate, and bills taken in favour of the trustee in that character. *Fright v. Earl of Plymouth*, 3 Atk. 480. **M**

(7) **Trustee employing agent—Insolvency of agent—Onus of proof.**

Where a trustee employs an agent under circumstances which justify the employment, and a loss arises from the insolvency of the agent, the onus is on the person, seeking to make the trustee liable for the loss, to show that it was attributable to the default of the trustee. *Re Brier*, L.R. 26 Ch. D. 238. **N**

(8) **Trustee liable for fraud of his solicitor.**

A trustee is liable for loss caused to the estate by the fraud of his solicitor in investing on a mortgage. *Sutton v. Wilders*, L.R. 12 Eq. 373. **O**

(9) **Trustee's liability for allowing money in a bank for an unnecessarily long time.**

A trustee will be liable, where he has unnecessarily left money in the hands of a banker who fails, when he ought to have invested them, or where he has paid money to a banker for investment and has neglected for some time to make enquiries as to such investment. *Can v. Cann*, 51 L.T. 770. **P**

3.—“Unless the delegation....business....necessary”—(Concluded). •

(10) Maximum time for such investment.

Six months is the maximum time for which the trustees should deposit money in a bank. (*Ibid.*) Q

(11) Trustee employing agent cannot give full power to him.

Even in cases where an agent is employed by the trustee, the latter should exercise his own judgment on every question, and he cannot give the agent full power to do what he may think fit. *Andrews v. Weall*, 42 Ch. D. 648. R

4.—“The appointment. . . proxy . . . not a delegation.”

(1) Delegation distinguished from appointment of proxy.

(a) The appointment of an attorney or proxy is not in all cases a delegation of the trust. *Attorney-General v. Scott*, 1 Ves. S. 413 S

(b) When the trustee has resolved in his mind in what manner to exercise his discretion, he cannot be said to delegate any part of the confidence, if he merely execute the deed by attorney or signify his will by proxy. (*Ibid.*) T

(2) Mere conveyance of the estate—Effect of.

(a) If a trustee convey the estate, the mere transfer will not have the effect of carrying with it the trust or power to the grantee. *Crewe v. Dicken*, 4 Ves. 97. U

(b) If a trustee devise the estate, the devisee cannot administer a discretionary trust, unless the original settlement contemplated such an event, and, by vesting the powers in the trustee and his assigns, annexed the powers to the estate in the hands of the devisee. *Re Butts' Estate*, 1 Drew. 319. Y

(3) General rule in the section modified in England

This general principle as to impropriety of delegating fiduciary duties has now been modified both by judicial decisions and statute in England. See S. 24 of the Trustee Act of 1893 of England. *Spaight v Gaunt*, 9 A.C. 1. W

48. When there are more trustees than one, all must join in the execution of the trust¹ except where the Co-trustees cannot act singly. instrument of trust otherwise provides.

(Notes).

(1) Rule involved.

The general rule is that the trust office is a joint one, the exception being that one of the trustees can execute a trust alone, only if the trust deed allows it. Lewin, p. 284, 11th Ed. X

(2) Principle of section.

S. 48 is in a sense corollary to S. 47, for, if the trustees cannot delegate their duties, it stands to reason that they can neither appoint one of themselves to manage the trust business. The reason is that the settlor has trusted all the trustees, and it behoves each and every one of them to exercise his individual judgment and discretion on every matter, and not blindly leave all matters to his co-trustees. *Munch v. Cochrill*, 5 My. and Cril. 179. Y

I.—“Where....one....all....join....of trust.”

(1) Trust, a joint office.

(a) Where the administration of the trust is vested in co-trustees, they all form, as it were, but one collective trustee, and therefore must execute the duties of the office in their joint capacity. *Ex parte Griffin*, 2 Gl. and J. 116. **Z**

(b) Whatever may be the number of trustees, the office is a joint one, and the co-trustees all form, as it were, but one collective trustee, and therefore must perform their functions in their joint capacity. 17 M. 212. **A**

(2) Effect of refusal of one trustee to join.

If any one trustee refuse or be incapable to join, the others are incompetent to proceed without him, and the administration must devolve on the Court. *Luke v South Kensington Hotel Co.*, L.R. 7 Ch. D. 789. **B**

(3) Act of one trustee.

(a) The act of one trustee, done with the sanction and approval of a co-trustee may be regarded as the act of both. *Messena v. Carr*, L.R. 9 Eq. 260. **C**

(b) But such sanction or approval must be strictly proved. *Lee v Saukey*, L. R. 15 Eq 204. **D**

(4) Duty of Court where there are numerous trustees

When the trustees are numerous, the Courts ordinarily give a special direction that the money should be paid to any two or more of them. *Attorney-General v. Brickdall*, 8 Beav. 223. **E**

(5) Trust—Public and private.

In private trusts, the acts of the majority of the trustees cannot bind the estate, but in the case of public trusts, the act of the majority will bind the rest, unless the act is beyond the proper sphere of the duty of the trustees. *Wilkinson v. Malin*, 2 Tyr. 544. **F**

(6) Joint action in receipts for money.

A receipt for money must, in the absence of a receipt clause specially worded, receive the joint authentication of the whole body of trustees, and not of the majority merely, or it will not be valid. *Walker v. Symonde*, 3 S.W. 63; *Hall v. Franck*, 11 Beav. 519. **G**

(7) All trustees must prove.

If a debtor to the trust becomes bankrupt, all the trustees should join in the proof; but, under the particular circumstances, the Court will make an order for some of the trustees to prove. *Ex parte Smith*, 1 Deac. 391. **H**

(8) Acknowledgment of debt by one trustee.

— will not save the bar of limitation. *Richardson v. Young*, L.R. 6 Ch. App. 478, *Re Macdonald*, (1897), 2 Ch. 181. **I**

(9) Dividends and rents.

If stock be standing in the names of several co-trustees, then, as they are joint tenants, and the bank does not recognise the trust, any one of them may receive the dividends, though all must join in the sale of corpus. *Re Coulson's Settlement*, 17 L.T.N.S. 27. **J**

I.—“Where....one....all. ..join. ..of trust”—(Concluded).

(10) Charitable trusts

Where a numerous body are appointed trustees by the Court, as in cases of charity, the Court, sometimes, for greater convenience, orders that a part of them shall form a *quorum*. Lewin, 11 Ed., p. 286. **K**

(11) Co-trustees not to sever in legal proceedings.

(a) The Court requires co-trustees, unless under special circumstances, to defend a suit jointly, and if they sever, the extra costs thereby occasioned must be borne by the defaulting party. *Re Isaac*, 1897, 1 Ch. 251. **L**

(b) But if one of the trustees be a defaulter and indebted to the estate, the others will be justified in severing from him *Smith v. Dale*, L.R. 18 Ch. D. 516 (518). **M**

(c) Where one trustee institutes a suit without consulting his colleagues, the suit is not maintainable, though his title is denied by the others. 24 M 296, 26 M 461, 29 M. 302 **N**

(12) Investment of trust funds.

(a) All investments of trust moneys must be in the joint names of the trustees, except where it is not possible to do so, because of the rules of a company. *Consterdine*, 31 Beav. 330. **O**

(b) But they may permit one of them to receive the income, though not the capital *Townby v. Sherborne*, 2 W and T, 629. **P**

(13) Co-trustees—Cheques.

(a) The co-trustees cannot permit one of their number to sign cheques. the bankers are not authorised to pay cheques signed by one only among them *Grough v. Bond*, 3 My. and Cr 490. **Q**

(b) If, however, a crossed cheque is signed by both, it can be entrusted by one trustee to the other for payment to the beneficiary. *Bernard v. Bayshaw*, 3 D. J. and S. 355 **R**

(14) Co-trustees—Bonds.

Co-trustees should not allow bonds payable to bearer to remain with one of them, though they may allow other title-deeds so to remain. *Trews v. Nobbs*, 8 Ch. D. 595. **S**

49. Where a discretionary power conferred on a trustee is not exercised reasonably and in good faith, such power may be controlled by a principal Civil Court of original jurisdiction.

Control of discretionary power 1.

(Notes).

General

(1) Principle involved in section.

Where a power is given to trustees to do, or not to do, a particular thing at their discretion, the Court cannot command or prohibit the trustees as to the exercise of that discretion, provided their conduct be *bona fide*, and their determination is not influenced by improper motives. *Thomas v. Derring*, 1 Koen 729. **T**

General—(Concluded).**(2) Investments—No control.**

The Court does not generally exercise control over the discretion of trustees in reference to the adoption of a particular investment. *Lee v Young*, 2 Y. and C. Ch. C. 592. **U**

(3) Maintenance to children—No control.

Nor in respect of fixing the *quantum* of maintenance to children. *Lewsey v. Harding*, Taunt 460. **Y**

(4) Objects of trust—No control.

Nor where trustees have been given a power as to the objects of the trust. *Waldo v. Carly*, 16 Ves 206. **W**

1.—“Control of discretionary power.”**(1) Trustees need not give reasons: if they give reasons, Court could scrutinize.**

The trustees are bound to exercise their discretion according to the circumstances as they exist at the time. They need not give reasons for the exercise of their discretion in a particular way, but if they have stated their reasons, the Court can set aside their conclusions, if they have proceeded on false premises. *Wilke's Charity*, 3 Mac. and G. 448. **X**

(2) Fraud or misbehaviour—A sufficient cause for interference

There is a sufficient ground for the interference by the Court, if the discretion is exercised by the trustees fraudulently, or if they misbehave, or if the discretion is infected with mischief. *Maddeson v. Andrew*, 1 Ves. 59. **Y**

(3) Court's power to supervise where trustees are before it.

The Courts have got an inherent power of keeping surveillance, in cases where the trustees are before it, although, in the trust-deed, the settlor has left everything to the trustees. *Attorney-General v. Governor of Harrow*, 2 Ves. 551. **Z**

(4) Public trusts.

The principle embodied in S. 49, Trusts Act *viz.*, that, where the discretionary power is not exercised reasonably and in good faith, such power may be controlled by a Civil Court of original jurisdiction, is equally applicable to public trusts. It was held in this case (a case of public trust) that the discretion must be exercised reasonably and in good faith, in furtherance of beneficial administration. 17 M. 212. **A**

50. In the absence of express directions to the contrary contained in the instrument of trust¹ or of a contract to the contrary entered into with the beneficiary or the Court² at the time of accepting the trust, a trustee has no right to remuneration for his trouble, skill, and loss of time in executing the trust³.

Nothing in this section applies to any Official Trustee, Administrator-General, Public Curator, or person holding a certificate of administration.

(Notes).

General.

(1) Rule embodied in section.

As regards trustees,—in the strict sense of the word, the general rule deprives them of any right to receive remuneration for their personal labour and services. *Le vin*, p. 308, 11th Ed. **B**

(2) Reason for the rule.

(a) The one reason given for the general principle is that, on these pretences, if admitted, the trust estate might be loaded and rendered of little value, besides the great difficulty there would be in settling and adjusting the *quantum* of such allowance, especially as one man's time may be more valuable than that of another; and there can be no hardship in this respect upon the trustee, for it is in his own option whether he will accept the trust or not. *Robinson v. Pett*, 2 W. and J. **C**

(b) The true ground seems to be that, if the trustees were allowed to perform the duties of the office and to claim compensation for their services, their interest would be opposed to their duty, and, as a matter of prudence, the Court will not allow a trustee or executor to place himself in such a false position. The services he renders are only incident to the performance of the duties imposed by the trust deed. *Barrett v. Harty*, 2 L.R. Eq. 789. **D**

(3) Scope of section.

The rule applies not only to those who are trustees in the strict sense of the word, but to all who are virtually invested with a fiduciary character *e.g.*, executors and administrators, mortgagees, receivers, a surviving partner, etc. *Re Walls*, L.R. 25 Q.B.D., *Re Ormsby*, 1 Ball and B. 189; *Burden v. Burden*, 1 V. and B. 170. **E**

1.—“Directions . . . in the instrument of trust.”

(1) Allowance to trustee by settlor.

If a settlor directs an allowance to the trustee, there is no objection to his taking it. *Webb v. Earl of Shaftesbury*, 7 Ves. 480. **F**

(2) Reference in cases where amount is not fixed.

If the settlor has not settled a fixed amount, a reference will be directed to settle the *quantum meruit*. *Ellison v. Aving*, 1 Ves. Sen. 111. **G**

(3) Such allowance not to cease on the institution of suit.

An allowance so given by the settlor, at the time of executing the trust deed, will, not cease on the institution of a suit. *Baker v. Martin*, 8 Sim. 25. **H**

2.—“Contract . . . entered . . . beneficiary or the Court.”

(1) Contract for allowance with *cestui que trust*.

The trustee may, at the time of accepting the trust, contract for an allowance or remuneration for his services. *Re Sherwood*, 3 Beav. 338. **I**

(2) How Courts view such contract.

Bargains of this kind are watched by the Court with exceeding jealousy. *Ayliffe v. Murray*, 2 Atk. 58. **J**

2.—“Contract....entered....beneficiary or the Court”—(Concluded).

(3) How such contracts to be entered into.

They must be freely made and not submitted from pressure. *Barrett v. Hatley*, 12 Jur. N.S. 426. **K**

(4) Fulfilment of such contracts.

Where the contract, at the time when it was entered into, was valid, the conditions of it must be fulfilled to the letter, or the trustee is not entitled to his reward. *Gould v. Flectwood*, 33 P. Wms. 251, note A. **L**

(5) Contract by trustee solicitor with beneficiary.

Where the person about to become trustee, and bargaining for remuneration, is a solicitor, who is acting as such in the preparation of the instrument of trust, which purports to confer the right of remuneration, there would be much difficulty to uphold the contract, unless the client had independent professional advice, or unless, at all events, the solicitor can show that the precise nature of the agreement was distinctly explained to the client. *Moore v. Flound*, 3 M. and Cr. 48. **M**

(6) Contract for allowance with Court.

A trustee dealing with the Court is at liberty, before accepting the trust, to stipulate for any remuneration which the Court may choose to give him. *Newport v. Barr*, 23 Beav. 30. **N**

(7) Effect of omission to contract.

But if he omit to contract with the Court before entering upon his duties, he will have great difficulty in obtaining compensation afterwards, and in no case will the Court remunerate a trustee for his trouble, by permitting him to make professional charges, where the settlor has not so directed, but will compensate him for his trouble, if at all, by a regular and fixed salary. (*Ibid.*) **O**

3.—“A trustee has no right....trust.”

(1) Solicitor.

(a) A solicitor trustee is not permitted to charge for his time, trouble, or attendance, but only for his actual disbursements *i.e.*, costs out of pocket. *New v. Jones*, 1 Mac. and G. 668. **P**

(b) The reason is that a trustee placed in the position of a solicitor might, if allowed to perform the duties of a solicitor and to be paid for them, find it very often proper to institute suit and carry on legal proceedings, which he would not do if he were to derive no emolument from them himself, and if he were to employ another person. *Harbin v. Darby*, 28 Beav. 325. **Q**

(c) Although a solicitor appointed executor is at liberty to charge for his professional services, he will only be entitled to charge for services strictly professional, and not for matters which an executor ought to have done without the intervention of a solicitor. *Harbin v. Darby*, 28 Beav. 325. **R**

(d) A solicitor who is also executor cannot, by postponing probate, entitle himself to charge for professional work done for his co-executor in relation to his testator's estate. *Re Barber*, L.R. 34 Ch. D. 77. **S**

3.—“A trustee has no right . . . trust”—(Continued).

(2) Express trustee.

Although a trustee should, by the direction of the author of the trust, carry on a trade or business at a great sacrifice of time, he will be allowed nothing for his personal trouble or loss of time. *Brocksopp v. Barnes*, 5 Madd. 90. T

(3) Constructive trustee.

(a) A constructive trustee cannot claim a salary or remuneration for managing a trade or business. *Stochen v. Davies*, 6 Beav. 371. U

(b) But *contra*, if one rightfully becomes possessed of another's money and rightfully trades with it, in which case, though he is a constructive trustee of the profits so made, he is allowed reasonable remuneration. *Wedderburn*, 22 Beav. 84. Y

(4) Trustee carrying on trade.

A trustee carried on business for six years, and accrual of large profits to the beneficiaries was the result, but it was held that the trustee had no right to exact or charge any remuneration or bonus in respect of such services. *Bennett v. Hartley*, L R. 2 Eq. 787. W

(5) Trustee cannot be receiver.

The trustee of an estate will not generally be appointed Receiver at a salary. *Sutton v. Jones*, Dick. 597. X

Exceptions to the general principle of section.

(1) Trustee may appoint Collector of rents.

A trustee, though he may not act as a Collector himself with a commission, may, if the case require it, appoint a Collector of rents at a commission. *Cox v. Bennett*, 39 W.R. 303. Y

(2) Trustee may appoint bailiff.

(a) As a man is not bound to be his own bailiff, if a trustee employs a skilful person in that capacity, the salary must be allowed. *Bonithon v. Hockmore*, 1 Vern. 316. Z

(b) The Court will grant that indulgence, where the estate is at such a distance that the trustee must have appointed a bailiff, had the estate been his own. *Godory v. Watson*, 3 Atk 518. A

(3) Payments to attorney to be recouped.

If an executor paid an attorney for his trouble and attendance in the management of the estate, he ought to be repaid the sums he had so disbursed. *Macnamara v. Jones*, 2 Dick. 587. B

(4) Executor may appoint accountant.

If the accounts be complicated, and the executor or trustee take upon himself to adjust and settle them, although it may occupy a great deal of his time and attention, the principle of equity is that he cannot claim a compensation; but if he choose to save his own trouble by employing an accountant, he is entitled to charge the trust estate with it under the head of expenses. *New v. Jones*, Exch. 9 Aug. 1833. C

3.—“A trustee has no right....trust”—(Concluded).

Exceptions to the general principle of section—(Concluded).

(5) Trustee could employ agent.

As a trustee will not be permitted to charge for his personal care and loss of time, it is but just that he should be allowed, on proper occasions, to call in the assistance of agents at the expense of the estate. *Lewin*, p. 769. D

(6) Non-action by executor—Legacy given to him by testator.

If an executor is incapable of acting or does not act, he cannot claim a legacy given for his trouble in the executorship. E

Trustee may not use trust-property for his own profit.

51. A trustee may not use or deal with the trust-property for his own profit¹ or for any other purpose unconnected with the trust.

(Notes).

General.

(1) Principle of section.

The principle is that trustees shall not derive any personal advantage from the administration of the trust property, and this principle is established with a view to keep the trustees in the straight line of their duty. *Burgess v. Winote*, 1 Eden 226. F

(2) Exception to the general principle.

The disability laid on the trustees does not apply to indirect gains obtained remotely and only incidentally because of his connection with the trust—Nor when he is himself the ultimate beneficiary. *Cameron v. Cameron*, 1893, 3 Ch. 468. G

(3) Scope of section.

The principle of the section applies to agents, guardians, directors of a company, secretary of a company, and generally to all persons clothed with a fiduciary character. *Momut v. Parke*, 2 Atk 52; *Power v. Glover*, 3 P. Wms. 251; *Costa Rica Ry. Co. v. Forwood* (1901), 1 Ch. 746. H

1.—“A trustee may not ...profit.”

(1) Trustee of a leasehold.

A trustee of a leasehold cannot get the lease renewed in his own name; if he does so, he would be a constructive trustee for the beneficiary. *Keech v. Sandford*, 2 W. and J. I

(2) Trustee taking bribes.

Similarly a bribe paid to the trustee, to influence him to lease or sell the trust property, has to be made good to the trust-estate. *Chandler v. Bradley*, 1897, 1 Ch. 315. J

(3) Commissions paid to trustees.

Commissions paid to a trustee by persons employed in trust-business, such as solicitors, belong to the estate. *Smith* (1896), 1 Ch. 71. K

1.—“A trustee may not . . . profit” — (Concluded).

(4) Trustee not to buy up debts for himself.

If trustees or executors buy up any debt or encumbrance, to which the trust estate is liable, for a less sum than is actually due thereon, they will not be allowed to take the benefit to themselves, but the creditors, or legatees or other *cestui que trust*, shall have the advantage of it.
Robinson v. Pett, 3 P. Wms. L

(5) Trustee—Mortgagee.

X, a trustee, lent money on a mortgage. The mortgagor devised the equity of redemption to the mortgagee, not knowing that the mortgagee was a trustee. Held, that X was a trustee of the accretion for the beneficiaries. *Hebble v. Payne*, 54 L.J. 840. M

(6) Retirement of trustee—Consideration therefor

Where a trustee retired from the trust in consideration of his successor paying a sum of money, the money was held to be a part of the trust estate.
Sugden v. Crossland, 3 Sm. and Giff. 192 N

(7) Trustee carrying on trade.

If the trustee carries on trade with the trust estate, while he is liable for all losses, he must account to the *cestui que trust* for all clear profits.
Docker v. Sonees, 2 M. and K. 655. O

(8) Trustee bargaining with beneficiary.

A trustee cannot bargain with his *cestui que trust* for a benefit, nor can a *cestui que trust* give a benefit to his trustee. *Vaughton v. Noble*, 30 Beav. 34. P

(9) Partner—Trustee.

If, after a partnership has determined, a partner retains the whole assets in trade, he must account for a share of the profits to the other partners.
Vyse v. Foster, L.R. 8 Ch. App. 309 (331), *Affd.* in L.R. 7 App. C. 318. Q

(9-a) Contra if trade not in a fiduciary position

But if the trade is not in a fiduciary position, but trust moneys come to him, though with a knowledge of the trust, though he must account for the principal and interest, he is not liable to account for the extra profits. *Stroud v. Gwyer*, 28 Beav. 130. R

(10) Heir purchasing encumbrance.

An heir is regarded as a trustee for the ancestor's creditors, and he cannot hold an incumbrance against him for more than he gave it. *Lancaster v. Evors*, 10 Beav. 154. S

(11) A joint purchaser—a trustee.

One of two joint purchasers of an estate is a trustee for the other of a proportionate part of the benefit derived by the former from an incumbrance bought by him at a less value. *Caster v. Horne*, 1 Eq. Ca. Ab. 7. T

(12) Trustee setting up adverse title.

A trustee cannot set up a title adverse to the *cestui que trust*. *Lansley v. Fisher*, 9 Beav. 90; *Tenant v. Treichard*, L.R. 4 Ch. App. 637. U

(12-a) But he need not deliver property, if title paramount exists elsewhere.

But though he cannot do so, he need not deliver the property to the beneficiary, if he has notice of title in another, which is paramount to the trust. *Neale v. Davies*, 5 DeG.M. and G. 258. Y

52. No trustee whose duty it is to sell trust property, and no agent employed by such trustee for the purpose of the sale, may, directly or indirectly, buy the same or any interest therein, on his own account or as agent for a third person.

Trustee for sale
or his agent may
not buy 1.

(Notes).

General.

(1) Principle embodied in section.

(a) The doctrine that a trustee cannot purchase from himself or his colleague stands more upon general principles than upon the circumstances of any individual case. They are completely prevented from so doing.

"The purchase is generally not permitted however honest the circumstances, the general interest of justice requiring it to be destroyed in every instance, as no Court is equal to the examination and ascertainment of the truth in much the greater number of cases." *Ex parte James*, 8 Ves. 337 **W**

(b) It is a principle which is universally applicable, that no trustee shall be allowed to enter into any engagements, in which he has or can have a personal interest, conflicting with the interests of those whom he is bound by fiduciary duty to protect. The principle is so much adhered to, that no question is allowed to be raised as to the fairness or unfairness of the transaction, for it is enough that the parties interested object. It may be that the terms on which a trustee has attempted to deal are as good as could have been obtained from any other quarter, that may even be better, but so inflexible is the rule that no enquiry into the matter is permitted. *Aberdeen Railway Co. v. Blackie*, 1 Macq. H.L. Cases 461 **X**

(c) This section is based upon the principle laid down in *Morse v. Royal*, where Lord Eskine said, with reference to the case of a trustee for sale selling to himself, "Without any consideration of fraud, or looking beyond the relation of the parties, the contract is void. There is no necessity for evidence, the contract is interdicted by the policy of the law." 12 Ves. 355 (372) **Y**

(2) Reason for the principle.

The situation of the trustee enables him to know the value of the property, and, as he acquired the knowledge at the expense of the beneficiary, he must apply it for the latter's benefit. Moreover, if the trustee appeared at the sale as a bidder, that would operate as a discouragement to others, who, seeing the vendor ready to purchase at or above the real value, would feel a reluctance to enter into the competition. *Ex parte Lacey*, 6 Ves. 629 **Z**

(3) Extent of the rule.

It is not necessary to show that the trustee had obtained an advantage, in order to set aside the purchase. The disability extends even to purchases made collusively through the intervention of a third party. *Campbell v. Walker*, 5 Ves. 678. **A**

General—(Concluded).

(4) Scope of the rule.

- (a) The rule enunciated in the section applies equally to executors, or administrators, and executors *de son tort*. '*Tudor's Leading Cases*,' p. 47. **B**
- (b) The principle against purchases by trustees applies more strictly to assignees in bankruptcy and their agents. *James*, 8 Ves. 348. **C**
- (c) The rule applies even to other persons in fiduciary character, who are constructive though not express trustees. *Knight v. Magonbanks*, 2 Hall and T. 308. **D**
- (d) But the rule does not apply to purchase by a mortgagee from his mortgagor. *Knight v. Magonbanks*, 2 Hall and T. 308. **E**
- (e) Nor does it apply to a person named as trustee, but who has disclaimed without having acted in the trust, or to a tenant for life whose consent to the sale is required by the terms of the power, or to mere nominal trustees, as trustees to preserve contingent remainder, or to a trustee who has no duty to perform. *Stacey v. Elph*, 1 M. and K. 195; *Dichonson v. Tabbot*, L.R. 6 Ch. App. 32; *Sutton v. Jones*, 15 Ves. 584. **F**

I.—"Trustee for sale or his agent may not buy."

(1) Trustee for sale may not purchase.

- (a) A trustee for sale, that is, a trustee who is selling, is absolutely and entirely disabled from purchasing the trust property—whether it be real estate, or a chattel personal, land or a ground rent, in reversion or possession, whether the purchase be made in the trustee's own name or in the name of trustee for him directly or indirectly. *For v. Mackreth*, 2 B.C.C. 400; *Crowe v. Ballard*, 2 Cox. 253; *Campbell v. Walker*, 5 Ves. 678. **G**
- (b) For he who undertakes to act for another in any matter cannot, in the same matter, act for himself. *Whitcomb v. Lawrence*, 3 Ves. 740; *Hall v. Noyes*, 12 Ves. 374. **H**

(2) Trustee may not buy as agent.

As a trustee cannot buy on his own account, it follows that he cannot be permitted to buy as agent for a third person. *Ex parte Bennett*, 10 Ves. 381 (400). **I**

(3) Agent of trustee may not buy.

The rule against purchasing the trust property applies to an agent employed by the trustee for the purposes of the sale, as strongly as to the trustee himself. *Whitcomb v. Minchin*, 5 Mad. 91. **J**

(4) Trustees may not lease to themselves.

The lease of an estate is in fact the sale of a partial interest in it, and therefore trustees for sale cannot demise to one of themselves. *Ex parte Hughes*, 6 Ves. 617. **K**

(5) The Court will not authorize the trustee to bid.

- (a) The Court has no jurisdiction, on behalf of the *cestui que trust* who are *sur jurs*, to authorise a trustee to bid, for that is a question the *cestui que trust* are entitled to decide for themselves. *Ex parte James*, 8 Ves. 352. **L**

1.—“Trustee for sale or his agent may not buy”—(Concluded).

- (b) But if a sale by auction under the direction of Court has been tried in vain, the trustee can make proposals on his own behalf, and the Court may be induced to accept the offer. *Tennant v. Frenchard*, L.R. 4 Ch. App. 537. **M**

Exceptions to General rule.

(1) Trustee may purchase from *cestui que trust*.

There is no rule that a trustee, whether for sale or otherwise, may not purchase from his *cestui que trust*. *Ex parte Lacey*, 6 Ves. 626, per Lord Eldon, see S 53. **N**

(2) How Courts view the transaction.

A purchase, by a trustee, from the *cestui que trust*, of the interest of the latter in the trust, is at all times a transaction of great nicety, and one which the Courts will watch with the utmost jealousy. *Coles v. Trecothick*, 9 Ves 244, per Lord Eldon. **O**

(3) What should be done before such transaction.

Before any dealing with the *cestui que trust*, the relation between the trustee and *cestui que trust* must be actually or virtually dissolved. The trustee may, if he pleases, retire from the office, and qualify himself for becoming a purchaser, by divesting himself of that character. *Downes v. Grazebrook*, 3 Mer 208. **P**

(4) Where *cestui que trust* is under disability.

If the *cestui que trust* be under disability as infants, the trustee, as he cannot be released from the liabilities of his situation, cannot, by act *in pais*, become the purchaser of the estate, but if it is absolutely necessary to sell and he offers more than others, he may apply to the Court for an order to be allowed to purchase. *Campbell v. Walker*, 5 Ves. 678. **Q**

(5) Purchase by surviving partner.

Surviving partners may buy from the representatives of a deceased partner. *Chambers v. Howell*, 11 Boav. 6. **R**

(6) Purchase by one executor from one another.

An executor who never proves can buy from an executor who proves. *Clark v. Clark*, L.R. 9 App. Ca 733. **S**

(7) Terms on which the sale will be set aside.

For—, see S, 62, *infra*. **T**

53. No trustee, and no person who has recently¹ ceased to be a

Trustee may not buy beneficiary's interest without permission.

trustee, may, without the permission of a principal Civil Court of original jurisdiction, buy or become mortgagee or lessee of the trust-property or any part thereof; and such permission shall not be

given unless the proposed purchase, mortgage, or lease is manifestly for the advantage of the beneficiary.

And no trustee whose duty it is to buy or to obtain a mortgage

Trustee for purchase.

or lease of particular property for the beneficiary may buy it, or any part thereof, or obtain a mortgage or lease of it, or any part thereof, for himself.

(Notes).

General.

(1) Ss. 52 and 53 compared.

S. 53 does not impose an absolute bar against a trustee purchasing trust estate from the beneficiaries, as S. 52 does in the case of trustee for sale. It does not lay down any fixed and arbitrary rule that there can be no such purchase under any circumstances, however, since the trustee knows all about the value of the estate, the Legislature imposes a restriction, viz., that permission must be taken from Court, it lays down a rule for the guidance of the Court, viz., that the Court should be satisfied that the transaction is to the advantage of the beneficiaries. *Williams v. Scott*, 1900 A.C. 499. **U**

(2) Indian and English law.

Under S. 53 of the Indian Trusts Act, the purchase by the trustee from the beneficiary would be void, if it is without the permission of the Court. If there is the permission, then the next question is whether the permission can be given; whereas, in England, the transaction is valid, even without such permission, if the parties were dealing at arm's length, if the transaction be beneficial to the *cestui que trustant* and if full information was given to the beneficiaries of the value of the property, of the nature of their interest therein, and of the circumstances of the transaction. *Chollinqueworth v Chambers*, (1896) 1 Ch. 685. **V**

(3) Object of section.

S. 53, Trusts Act, strikes at transactions by a trustee after acceptance of trust. It does not render void a mortgage in one's favour, before one becomes a trustee of the property, by the deed of trust itself, as a condition of the trust imposed by the settlor. 31 B. 271 **W**

(4) Scope of section.

(a) The section applies not only to a trustee, but even to a trustee of a subsidiary settlement, by which a share in the proceeds of the sale is settled; a purchase by him can be challenged by the beneficiaries; it applies also to constructive trustees, as for example, a solicitor purchasing from a client, or a person, who is in the position of adviser to the beneficiary, doing so. *Tate v. Williamson*, 2 Ch. A. 55. **X**

(b) A solicitor would come within the rule, if he buy direct from the client or from the client's trustee in bankruptcy. *Spender v. Tapham*, 22 Beav. 573; *Barrow v. Willis*, (1900) 2 Ch. 121. **Y**

(c) A trustee of a trustee's marriage settlement is not within the purview of the section. *Huckley*, 2 Ch. D. 190. **Z**

I.—“Recently.”

The term “recently” is somewhat vague, though, on the other hand, the mention of a specific period might enable a fraudulent trustee to evade the provisions requiring the permission of a Civil Court. No doubt, in construing the section, a Court would probably be guided by the circumstances under which the trustee retired from trusteeship, and whether, at the time of retirement, he had this object in view. *Ex parte James*, 8 Ves. 851. **A**

2.—“Trustee may not . . . permission.”

(1) Nature of the transaction.

The transaction is not *ipso facto* void and could only be impeached. *Hickley*, 2 Ch. D. 190. B

(2) Exceptions to the rule.

(a) Mere nominal trustees, as, for instance, a trustee who has disclaimed without ever acting in the trust, may become purchasers. *Lewin*, 11th Ed., p. 566. C

(b) Where the *cestus que trustant* are creditors, the trustee could purchase only with the sanction of all. In *Coles v. Trecothuck*, Lord Eldon said “A trustee may buy from the *cestus que trust*, provided that there is a clear and distinct contract ascertained to be such, after a jealous and scrupulous examination of all the circumstances, that the *cestus que trust* intended the trustee should buy; and that there is no fraud, no concealment, no advantage taken by the trustee of information acquired by him in the character of trustee. 9 Ves. 234 (248), 1 Smith 233; 7 R.R. 167. D

(c) Similarly co-partners could purchase from the representatives of a deceased partner. *Chambers v. Howell*, 1 Beav. 6. E

(d) Where the beneficiary undertook the entire management of the sale to himself, and agreed to sell a lot to one of the trustees, it was held that the sale was not impeachable. *Coles v. Trecothuck*, 9 Ves 234. F

(e) Similarly, where a beneficiary strongly urged the purchase upon one of the trustees, who at first expressed an unwillingness, but afterwards, upon being pressed, agreed to the terms, the sale was held to be valid. *Morse v. Royal*, 12 Ves. 355. G

(f) The rule as to the extreme fairness to be observed in purchasing from beneficiary does not apply to persons, who are only constructive trustees by virtue of a business contract entered into with the said beneficiaries, as for example, a mortgagee could purchase from the mortgagor. *Knight v. Majorbanks*, 2 M. and G. 10. H

54. A trustee or co-trustee, whose duty it is to invest trust money on mortgage or personal security, must not invest it on a mortgage by, or on the personal security of, himself or one of his co-trustees.

Co-trustees may not lend to one of themselves¹.

(Notes).

1.—“Co-trustees may not lend to one of themselves.”

(1) Investment of trust moneys on personal security.

(a) Trustees may lend trust moneys on personal security, where they have

- been expressly empowered to do so by the instrument of trust. *Forbes v. Ross*, 2 B.C. C. 480, *Paddon v. Richardson*, 7 De G.M. and G. 563. I

(b) But such authority cannot be considered to be communicated to a trustee, where there is a direction in the instrument of trust to lend the money at interest at the discretion of the trustee, or on such good security as the trustee can procure, and may think safe. *Wilkes v. Steward* G. Coop 6. J

1.—“Co-trustees may not lend to one of themselves” —(Concluded).

(2) Power to lend on personal security under the instrument.

A —, may mean permission to lend on the security of personal property, or the security of the personal undertaking of the borrower, on a simple bond. *Peckard v. Anderson*, 13 L.R. Eq. 608. **K**

(3) Power to lend on personal security—Lending to one of co-trustees, if allowed.

(a) Where the instrument empowers the trustees to lend on personal security, they are prohibited from lending to one of themselves. *Stickney v. Sewell*, 1 M. and Cr. 14. **L**

(b) The reason is that the author of the trust relies upon the united vigilance of all the trustees, in respect of the solvency of the borrower. *Westover v. Chapman*, 1 Coll. 177. **M**

(4) Lending of trust-moneys on mortgage to one of trustees—if allowed.

(a) It is not competent to a trustee to lend trust-moneys on mortgage to another co-trustee. *Stickney v. Sewell*, 1 M. and Cr. 8. **N**

(b) The reason is that all must exercise an impartial judgment as to the sufficiency of the security. *Crosskill v. Bowser*, 32 Beav. 86, *Fletcher v. Green*, 33 Beav. 426. **O**

CHAPTER VI.

OF THE RIGHTS AND LIABILITIES OF THE BENEFICIARY.

55. The beneficiary has, subject to the provisions of the in-

Right to rents **instrument of trust, a right to the rents and profits**
and profits. **of the trust-property.**

(Notes).

[**N.B.**—See, also, notes under Ch. III, *supra*, and under S. 56, *infra*.]

Beneficiary.

Under the Indian Trusts Act, the beneficiary has no estate or interest in the subject-matter of the trust. He has only a right to proceed against the trustee. 18 M.L.J. 158. **P**

1.—“Right to rents and profits.”

(1) *Cestui que trust*'s estate in simple trust.

Where there is a simple trust, the equitable ownership is compounded of the permanency of the profits and the disposition of the estate—the *jus habendi* and the *jus disponendi*. *Smith v. Wheeler*, 1 Mod. 17. **Q**

(1-a) Rents and profits.

The *cestui que trust* has a right to take rents and profits or income of the trust property. *Smith v. Wheeler*, 1 Mod. 17. **R**

(2) Right of *cestui que trust* to possession of lands.

Where there is a trust of lands, the *cestui que trust* may compel the trustee to put him in possession of the estate. *Brown v. How*, Barn. 354; see, also, *Attorney-General v. Lord Greville*, (*ibid.*), p. 150. **S**

(3) Rule giving *cestui que trust* possession—Applicability.

(a) The rule giving the *cestui que trust* possession can be applied only to the simple trust in the strict sense. *Jenkins v. Milford*, 1 J. and W. 629. **T**

1.—“*Right to rents and profits*”—(Concluded).

- (b) For, where the *cestui que trust* is not exclusively interested, but others have also a claim, it rests in the discretion of the Court whether the actual possession shall remain with the *cestui que trust* or the trustee, and, if possession be given to the *cestui que trust*, whether he shall not hold it under certain conditions and restrictions. (*Ibid.*) U

(4) *Cestui que trust* ejected from possession—Liability of trustee.

Where a trustee ejects a *cestui que trust* from the possession of the estate, the latter may compel the trustee to account, not only for rents actually received, but also for the whole of the rents legally payable by the tenants. *Kaye v. Powel*, 1 Ves. Jun. 408. Y

(5) Chattels personal—*Cestui que trust's* possession.

“In trusts of chattels personal, as where heirlooms are vested in a trustee on a trust for the persons successively entitled under the limitation of a strict settlement, the *cestui que trust* for the time being is equally entitled to the use and the possession of the goods during the continuance of his interest.” Lewin, 11th Ed., p. 858. W

(6) Conveyance, right to call for.

A *cestui que trust*, entitled to require the trustee to put him in possession of the trust property, may call upon the trustee to convey the property to such person as he directs. *Payne v. Barker*, S.G. Bridgm. Rep. 24. X

(7) *Cestui que trust's* estate in special trusts.

A *cestui que trust* can have the intention of the author of the trust specifically enforced to the extent of his particular interest. See Lewin, p. 864. Y

(8) Trustee and beneficiary, rights of.

A beneficiary has the use, whereas the trustee has the legal ownership. See Griffith's Trusts Act, p. 111. Z

(9) Order under this section—Appeal.

There is no appeal from an order under this section. 19 A. 131. A

56. The beneficiary is entitled to have the intention of the

Right to specific execution. author of the trust specifically executed¹ to the extent of the beneficiary's interest ;

and, where there is only one beneficiary and he is competent

Right to transfer of possession 2. to contract, or where there are several beneficiaries and they are competent to contract and all of one mind, he or they may require the trustee to transfer the trust-property to him or them, or to such person as he or they may direct. *

When property has been transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in the second clause of this section applies to such property during her marriage³.

Illustrations.

4 (a) Certain Government securities are given to trustees upon trust to accumulate the interest until A attains the age of 24 and then to transfer the gross amount to him. A, on attaining majority, may, as the person exclusively interested in the trust-property, require the trustees to transfer it immediately to him.

5 (b) A bequeaths Rs. 10,000 to trustees upon trust to purchase an annuity for B, who has attained his majority, and is otherwise competent to contract. B may claim the Rs. 10,000.

6 (c) A transfers certain property to B, and directs him to sell or invest it for the benefit of C, who is competent to contract. C may elect to take the property in its original character.

(Notes).

N.B.—See also notes under S. 55, *supra*.

1.—“Intention of...specifically executed.”**(1) Right to specific execution.**

- (a) The — may be defined as the right to enforce in equity the specific execution of the intention of the settlor to the extent of the *cestui que trust's* particular interest. Lewin, p. 864. **B**
- (b) Though others entitled may express a desire that the trust should be differently administered, yet, if such divergence from the donor's intention would be prejudicial or injurious to the right of any one *cestui que trust*, that *cestui que trust* may compel the trustees to act up strictly and literally to the line of duty prescribed. *Deeth v. Hale*, 2 Moll. 317. **C**
- (c) “The intention of the testator is to be considered.” (Godefroi, p. 578). **D**
- (d) A trustee “is to adhere to the terms of his trust, in all things, great and small, important and seemingly unimportant.” *Birrell*, 22. **E**
- (e) “Every person who accepts a trust is bound to execute it with fidelity and with reasonable diligence.” 2 St. Eq. Jur. 918, see, also, *Charitable Corporation v. Sutton*, 2 Atk. 406. **F**
- (f) Trusts must be fulfilled strictly according to the directions. *Craven v. Coadock*, 20 L.T.N.S. 638. **G**
- (g) Where, in view of the benefit of those who were to take in succession, the testator had placed the property in the hands of the trustee, such intention ought not to be defeated by delivering over the property to the *cestui que trust* for life, unless where, from the nature of the property, it was clear that the testator could not have intended to exclude the *cestui que trust* from possession of the property. *Tudd v. Lister*, 5 Madd. 429. See, also, *Blake v. Bunbury*, 1 Ves. 194. **H**

(2) S. 12, Specific Relief Act.

According to—, specific performance of any contract may, in the discretion of the Court, be enforced, when the act agreed to be done is in the performance, wholly or partly, of a trust. See also the illustration to cl. (a) of the section. **I**

1.—“Intention of . . . specifically executed ”—(Continued).

(3) Conversion of special trust into simple trust.

“If there be only one *cestus que trust*, or there be several *cestus que trustant* and all of one mind (in each case *sui juris*), the specific execution may be stayed, and the special trust will then acquire the character of a simple trust.” Lewin, p. 864. **J**

(4) One of several beneficiaries can compel sale.

In the case of a trust for sale, even where one only of the beneficiaries desire a sale, when the rest of them prefer retention of the property as realty, the trustee can be compelled to carry out the sale. *Deeth v. Hale*, 2 Moll. 317. But see *Marsden v. Kent*, 5 C.D. 598. **K**

(5) One of several beneficiaries cannot prevent sale.

(a) On a trust to sell property and divide the proceeds among the beneficiaries, one of the beneficiaries cannot by himself prevent the disposal of his share. *Holloway v. Radcliffe*, 23 Beav. 163, see *Biggs v. Beacock*, 22 Ch. D. 284. **L**

(b) But where all the beneficiaries agree, they can put an end to the trust and insist on the property remaining as realty. *Re Cotton's Trustees*, 19 Ch. D. 624; see *Dixon v. Gayfer*, 17 Beav. 421. **M**

(6) Trust for sale—Acceleration of trust—Consent of beneficiaries.

(a) Where a trust for sale, after the death of a certain person, is created, the trustees cannot accelerate such trust, so as to bring the estate to sale during that person's life, even with his consent, except where all the beneficiaries are *sui juris* and consent. *Lewsham v. Chawner*, 4 K.L. J. 458. **N**

(b) This rule is so stringent that a premature sale cannot be ordered even by the Court. *Blacklow v. Laws*, 2 Hare 40. **O**

(c) And the mere fact that all the beneficiaries may subsequently consent to a premature sale by trustees will be no ground for enforcing such sale on an unwilling purchaser. *Re Head*, 45 Ch. D. 310. **P**

(7) Right of beneficiaries in respect of legacies.

In the case of legacies devised upon trust for the purchase of annuities, the legatees, the intended annuitants, may, if they be *sui juris*, claim the legacies at once. *Dawson v. Hearn*, 1 R.L.M. 606. **Q**

(8) Agreement by beneficiary not to interfere with trust, effect of.

An express undertaking by the *cestus que trust*, not to seek to put an end to the special trust, cannot by itself preclude him from determining the trust subsequently. *Re Hale and Clarke*, 55 L.J.N.S. Ch. 550; 34 W.R. 624; 55 L.T.N.S. 151. **R**

(9) Special trust will proceed.

—till specific execution of the same is countermanded by the *cestus que trust* or the joint *cestus que trust*. See *Waller v. Maunde*, 19 Ves. 429. **S**

(10) Extent and nature of estate to be conveyed.

(a) A *cestus que trust* has no right to ask for a conveyance of a larger legal estate than he has equitable. *Saunders v. Neville*, 2 Vern. 428. **T**

(b) Nor can he require the trustee to convey the trust estate piecemeal at various times. *Goodson v. Ellison*, 3 Russ. 583 (594). **U**

1.—“Intention of...specifically executed”—(Concluded).

(c) Nor can a trustee, like a mortgagee, be called upon to convey the estate by any description other than that by which the conveyance was made to himself. (*Ibid.*) **Y**

(d) Nor can a trustee be called upon to execute a conveyance containing recitals which are inaccurate. *Hartley v. Burton*, 3 L.R. Ch. App. 365. **W**

(11) Co-trustee's accounts, sanction of.

A trustee, in addition to his duty to render accounts, becomes liable himself for misrepresentation, if he stands by and sanctions the rendering of improper accounts by a defaulting trustee. *Horton v. Brocklehurst* (No. 2), 29 Beav. 504; see, also, *Brazier v. Camp*, 63 L.J.Q.B. 237. **X**

(12) Right of beneficiary to accurate information.

(a) A beneficiary is entitled to get accurate information regarding the state of the trust-property, and to inspect the accounts relating to it. *Ottley v. Gilby*, 8 Beav. 602. **Y**

(b) So also a legatee. (*Ibid.*) **Z**

(13) Suit by representatives of testator.

The representatives of a testator, who created trusts for religious or charitable purposes, are competent to sue for the enforcement of, or rectification of the abuses in, the trusts, even though such representatives may not be personally interested in the same. 5 C. 700=6 C.L.R. 58. **A**

2.—“Right to transfer of possession.”

(1) Beneficiary's right to possession from trustee.

(a) A trustee holding trust-lands can be compelled to put the beneficiary in possession of them, and the trustee ejecting him will be liable to account to him for rents. *Kaye v. Powel*, 1 Ves. Jur. 408; see *Brown v. How*, Barn 354. **B**

(b) Where there is only one person interested in the trust and he is *sui juris*, or where there are several and they all happen to be of one mind, the trustee may be called on to stop the execution of the trust, and at once transfer the legal estate to the beneficiary or the beneficiaries. *Josselyn v. Josselyn*, 9 Sim. 63; see *Saunders v. Vautier*, 4 Beav. 115; see III. (a) to the section. **C**

(2) Trustee and cestui que trust—wrongful withholding.

(a) A trustee has no right to withhold the property, after demand of possession of the same by the *cestui que trust* entitled thereto. 18 M.L.J. 206. **D**

(b) When he thus wrongfully withholds, he is in the position of a wrong-door, and, as such, cannot grant remission of rents to tenants. (*Ibid.*) **E**

(3) Trustee refusing to transfer—Effect.

(a) A trustee refusing to transfer possession at the beneficiary's request, and thus driving him to take proceedings for compelling him to do the same, will be liable to pay the costs of such proceedings. *Jones v. Lewis*, 1 Cox. 199. **F**

(b) Unless there was reasonable ground for such refusal. *Goodson v. Ellisson*, 3 Russ. 583. **G**

2.—“Right to transfer of possession”—(Continued).

(c) Or he acted *bona fide* under the advice of counsel. *Angier v. Stannard*, 3 M. and K. 556; *Scott v. Milne*, 25 Ch. D. 710; *Re Beddoe*, (1893) 1 Ch. 547. **H**

(d) In *Watts v. Turner* (1 R. and M. 634), the trustee has been made to pay costs, though the *cestui que trust*, instead of filing a *bill*, might have enforced a conveyance by the summary process of a *petition*. **I**

(4) Delay by trustee in the assignment of legal estate—Costs of suit and conveyance.

Where there is no excuse whatever for the delay in the execution of a deed by a trustee, which he is bound to execute, and the trustee has been, through his own negligence and obstinacy, though through no actual misconduct further than the delay he has shown in doing what he is bound to do, brought into Court, the trustee will, though his position may undoubtedly be a thankless one, be made to pay the costs of the suit, though, however, he will get his costs of, and attending, the conveyance. 11 C. 628. **J**

(5) Improvident beneficiaries not disentitled to payment.

A beneficiary is not disentitled to payment, merely because he may be improvident, trustees withholding payment from a *cestui que trust*, who is a *suu juris*, on this ground, will have to pay the costs of the suit to enforce payment. *De Burgh v. M'Clintock*, 11 L.R. Ir. 220. **K**

(6) Costs to be discharged out of estate.

The costs which a trustee incurs as regards conveyance must be paid by the *cestui que trust*, or, which is the same thing, must be discharged out of the trust-estate. Lewin, p. 864. **L**

(7) Inquiries by trustees.

In a conveyance and transfer by a trustee by order of a *cestui que trust*, the trustee must enquire whether the title of the *cestui que trust* is complete. *Goodson v. Ellison*, 3 Russ. 583. **M**

(8) Beneficiary to make out exclusive right to possession.

A trustee may insist upon its being clearly made out that the person seeking for transfer of possession from him has the exclusive right thereto as *cestui que trust*. *Holford v. Phipps*, 3 Beav. 434; *Etchells v. Williamson*, W.N. 1869, p. 61. **N**

(9) Possession in case of several beneficiaries—Discretion of Court.

Where there are several beneficiaries, none of whom is entitled to exclusive possession, the decision as to whether the trustee or beneficiaries should have possession rests in the discretion of the Court. *Pugh v. Waghad*, 12 Beav. 517. **O**

(10) Series of equitable interests.

(a) “In general, in the simple trust, there are no *intermediate steps* of the *equitable interests*, so that, if A be trustee for B, who is trustee for C, A holds in trust for C, and must convey the estate as C directs.” *Head v. Lord Teynham*, 1 Cox. 57, see Lewin, p. 862. **P**

(b) “But if any special confidence or discretionary power be reposed in B, which requires him to have the legal estate, he may then call upon the original trustee to execute a transfer to himself.” *Wetherell v. Wilson*, 1 Keen 86. **Q**

2.—“*Right to transfer of possession*”—(Continued).(11) *Cestui que trust's right to hold property absolutely.*

- (a) The right of beneficiaries, who attain the age of twenty-one, to enter upon the absolute use and enjoyment of the property given to them by will, must always be upheld, notwithstanding any directions by the testator to the effect that they are not to enjoy it until a later age. *Gosling v. Gosling*, Johns 265; see, also, *Bubb v. Padwick*, 13 Ch. D. 517. **R**
- (b) If the *cestui que trust* has an absolute and indefeasible interest in the trust property, he is not bound to wait until the time fixed by the author of the trust. See *Agnew*, at p. 271. **S**
- (c) But it is otherwise, if the intermediate estate does not go to the same beneficiary. *Re Colquhan, Henry v. Strong*, 39 Ch. D. 443 (but see *Kearsley v. Woodcock*, 3 Ha. 185); see *Underhill*, p. 297. **T**
- (d) Where a fund is given on trust to accumulate until the beneficiary reaches a certain age beyond majority, he gets the right, as soon as he attains majority, to claim that the fund should be paid over to him as the person exclusively entitled thereto. *Magrath v. Morehead*, L.R. 12 Eq. 491. **U**

(12) *Beneficiary not estopped by taking portion of relief.*

The mere fact that a beneficiary, aware of a breach of trust, chooses to take from the trustee a portion only of the relief that the beneficiary is entitled to, does not, by itself, deprive him of the right to obtain the further reliefs as well. *In re Cross*, 20 Ch. D. 109. **Y**

(13) *Money given to be laid out in land to be conveyed, or land to be sold, and proceeds paid to A—Election.*

“Where money is given to be laid out in land, to be conveyed to A, though there is no gift of the money to him, yet in equity it is his, and he may elect to have it laid out; on the other hand, where land is given upon trust to sell, and pay the proceeds to A, though no interest in the land is expressly given to him, in equity, he is the owner, and the trustee must convey as he shall direct. If there are other purposes for which it is sold, still he is entitled to the surplus of the price, as the equitable owner subject to those purposes, and if he provides for them, he may keep the estate unsold.” *Pearson v. Lane*, 17 Ves. 101. **W**

(14) *Trustees for appointees.*

Trustees, holding a fund on such trusts as a person, by an instrument to be executed in a particular manner, may appoint, must of course be careful, in transferring it to the appointees, to see that each and every formality attending the power has been duly observed. *Hopkins v. Myall*, 2 R. and M. 86. **X**

(15) *Mortgagee of all beneficial interest.*

- (a) A mortgagee of an only beneficiary, or, what comes to the same thing, of the several beneficial interests of all the beneficiaries, cannot put an end to a trust (say, for sale), and demand a conveyance of the legal estate from the trustees, so long as any equity of redemption is in existence (i.e., to say until sale or foreclosure). *Underhill*, p. 300. **Y**
- (b) No doubt when he has obtained a decree for absolute foreclosure, he could put an end to the trust. (*Ibid.*); *Copper v. Allen*, 4 Ch. D. 802. **Z**

2.—“*Right to transfer of possession*”—(Concluded).(16) **Adverse possession—Cause of action—Trustee and *cestui que trust*—Limitation.**

- (a) When property is placed in the hands of another by way of trust, no cause of action arises to the owner, until there has been a demand by the owner for the restoration of the property, and a refusal by the trustee to give up the property. 3 B.L.R. Ac. 409. **A**
- (b) The period of limitation begins to run from the date of such refusal or distinct assertion of adverse right, and not from the date the trustee enters into possession. (*Ibid.*) **B**

(17) **Property dedicated to idol—Rights of heirs.**

Where a Hindu widow dedicated property by deed to the worship of an idol, and the property was given to trustees in trust, after the death of the widow, to permit the male heirs of her late husband to receive the rents, *held*, that such heirs were entitled to actual possession and to the rents and profits of the estate, provided they devoted it according to the provisions of the deed to the worship of the idol. 3 B.L.R.O.C. 92. **C**

(18) **Opinion of majority of beneficiaries prevails.**

Where a question of trust management has been fairly considered by all the Uthalars of a Malabar Devesam, so that each has an opportunity to let his views be known before a decision is passed, the opinion of the majority is binding on the minority, if it be arrived at in the fair exercise of the discretionary powers committed to them. 6 M. 270. **D**

(19) **Trustee, whether can insist on obtaining release.**

A trustee cannot insist on obtaining a release as a condition precedent to his delivering the trust property to the beneficiary. So he will be mulcted in costs even though he *bona fide* believed that he had such right. 13 M.L.J. 206 (208). **E**

(20) **Suit by two out of eleven beneficiaries for possession—Maintainability.**

See 23 M. 239. **F**

(21) **Decree against transferee.**

Devise of taluka to certain persons in succession for life and remainder in fee—Grant by Crown to a life-tenant of an absolute estate—Declaration of trust by grantee in favour of surviving devisee—Transfer by gift by grantee in breach of trust—Attachment of part of taluka in execution of money-decree against grantee and transferee—Objection to attachment by heir of remainderman—Trust—Escheat—Property not saleable in execution of decree against transferee. Oudh S.C. 224. **G**

3.—“*When property . . . marriage.*”**Restraint on anticipation.**

- (a) By no device whatever can the—be evaded. See *Stanley v. Stanley*, 7 Ch. D. 589. **H**
- (b) The reason for this is the peculiar nature of the trust. See Agnew at p. 272. **I**
- (c) It is intended as a provision for the wife, and the object would be defeated, if the wife could obtain possession of the principal. (*Ibid.*) **J**

3.—“ When property....marriage ”—(Concluded).

- (d) Where consols had been bequeathed on trust for providing a life-annuity to a lady, to be held for her separate use without power of anticipation, but, the lady was unmarried, and the restraint on anticipation was of no effect, she was held to possess the right of at once compelling the transfer of the consols to her own name. *Re Brown*, 27 Beav. 324. **K**
- (e) But if there is a gift to the lady and her issue, she being not the only person beneficially interested, will not be entitled to demand the capital. *Wise v. Piper*, 13 Ch. D. 848. **L**
- (f) Where a fund is vested in trustees in trust for a wife for her separate use, with remainder on such trusts as she may by will appoint, and she by will gives legacies, and disposes of the residue and appoints executors, the original trustees are bound to transfer the fund to the executors to be administered by them. *Re Phibbrick's Trust*, 13 W.R. 570; *Hayer v. Outley*, 14 L.R. Eq. 1 (*Ibid.*) **M**

4.—“ III. (a). ”

Josselyn v. Josselyn, 9 Sim. 63 (noted *supra*) forms the basis of this illustration. **N**

5.—“ III. (b). ”

Re Brown, 27 Beav. 324 (noted *supra*) forms the basis of this illustration. **O**

6.—“ III. (c). ”

Contra, Holloway v. Radcliffc, 23 Beav. 163 (noted *supra*). **P**

57. The beneficiary has a right, as against the trustee and all

Right to inspect
and take copies of
instrument of trust,
accounts, &c. 1.

persons claiming under him with notice of the trust, to inspect and take copies of the instrument of trust, the documents of title relating solely to the trust-property, the accounts of the trust-property, and the vouchers (if any) by which they are supported, and the cases submitted and opinions taken by the trustee for his guidance in the discharge of his duty.

(Notes).

I.—“ Right to inspect....accounts, etc. ”

(1) Right of beneficiary to inspect and take copies.

(a) It is open to the beneficiaries to demand, at all reasonable times, inspection of documents relating to the trust. *Re Cowin*, L.R. 31 Ch. D. 179; *Wynne v. Humberston*, 27 Beav. 421. **Q**

(b) And, at their own expense, to obtain copies of the same. *Ex parte Holdsworth*, 4 Bing. N.S. 386. **R**

(2) Expense of copy not to be charged on trust funds.

The expense of supplying the beneficiary with a copy of the accounts cannot be charged on the trust funds. *Ottley v. Gilby*, 8 Beav. 602. **S**

(3) When does right to inspect come into existence.

(a) But the right of *cestui que trust* to inspect does not come into existence, until the relation of trustee and *cestui que trust* has been established to the Court's satisfaction. *Wynne v. Humberston*, 27 Beav. 421. **T**

(b) For, as long as the claim is disputed, the would-be *cestui que trust* is considered only as a stranger. (*Ibid.*) **U**

1.—“Right to inspect . . . accounts, etc.”—(Continued).

- (c) If the relation of trustee and *cestui que trust* has been established, all cases submitted and *opinions* taken by the trustee, for his guidance, in the discharge of his duty, and not for the purpose of his own defence, in any litigation against himself, must be produced to the *cestui que trust*. *Wynne v. Humberston*, 27 Beav. 421. **Y**

(4) Inspection directly or through solicitors.

A trustee must permit the inspection of accounts and vouchers by the beneficiary, directly or even through his solicitors. *Kemp v. Burn*, 4 Giff. 348; *Ottley v. Gilby*, 8 Beav. 602. **W**

(5) Trustee to keep himself ready with accounts.

- (a) As an incident to the beneficial enjoyment, the *cestui que trust* is entitled to call on the trustee to give accurate information as to the state of the trust property. *Spring v. Dashwood*, 2 Giff. 521. **X**
- (b) It is the essential duty of every person liable to render accounts, whether as a mere agent or receiver or executor or as trustee, to always keep himself ready with such accounts. *Pearse v. Green*, 1 J. and W. 135. **Y**

(6) Right of legatee.

- (a) A legatee is a *quasi cestui que trust*. *Ottley v. Gilby*, 8 Beav. 602. **Z**
- (b) Hence, he has a right to have a satisfactory explanation of the trust property and a right to inspect the accounts. (*Ibid.*) **A**
- (c) But he is not entitled to ask for a copy of the accounts at the expense of the estate. *Ottley v. Gilby, supra*. **B**

(7) Title-deeds, custody of.

- (a) The title-deeds of an estate do not form a part of the usufructuary enjoyment. *Lewin*, p. 853. **C**
- (b) The trustees have a right to the custody of the instrument creating the trust, and of all muniments of title relating to the trust property. *Meux v. Bell*, 1 Hare 95. **D**
- (c) Trustees must have the documents relating to the trust with them, for they are in duty bound to maintain and defend all suits necessary for protecting and preserving the trust estate, e.g., rent-suits. *Goode v. Burton*, 11 Jur. 851. **E**
- (d) Where, on a person vesting an estate in trustees upon particular trusts, one of which being to receive the rents and pay them over to the settlor for life, the deeds are delivered into the possession of those trustees, they have a right to the custody of them for the benefit of all parties interested. *Garner v. Hannington*, 22 Beav. 630. **F**

(8) Trustees may sue for custody of title-deeds.

- (a) Since trustees are entitled to have possession of the title-deeds, they may institute proceedings to have them delivered up. *Smith v. Willis*, Tay. 159. **G**
- (b) If the legal estate, whether of freeholds, copyholds, or leaseholds, is vested in a trustee or executor, in trust for the *cestui que trust* entitled absolutely in possession (and not for certain individuals entitled in succession), the *cestuis que trust* (if they are infants, their guardians) have right to institute proceedings for getting the custody of the deeds. See *Lewin*, p. 884. **H**

I.—“Right to inspect...accounts, etc.”—(Concluded).

(9) Title-deeds not with trustee—Effect.

There being a trust to perform, if the trustees willingly permit the title-deeds relating to trust-estate to get out of their possession, they will be guilty of a breach of their duty. *Meux v. Bell*, 1 Hare 95. I

(10) Trustee improperly handing over deeds—Effect.

If a trustee improperly hands over or lends the deeds to the settlor, under circumstances showing a case of gross negligence amounting to fraud, and the settlor began to deal with the estate as an absolute owner, the trustee may be made responsible for the consequences. *Evans v. Bucknell*, 6 Ves. 174 (190). J

(11) *Cestui que trust* for life permitted to keep deeds with him—Effect.

If a *cestui que trust* for life is permitted to keep the title-deeds with him, he may mortgage or transfer the trust-estate for valuable consideration, without notice, and thus injure the interests of the remainderman. See Agnew, p. 212. K

(12) Tenant for life—Custody of deeds.

(a) However, the legal tenant for life of freeholds is entitled to the custody of the deeds. *Re Beddoe*, (1893) 1 Ch. 557. L

(b) But this is not the case where he has been guilty of misconduct, so that the safety of the title-deeds is endangered, or where the rights of others intervene and it becomes expedient for the Court to take charge of the deeds to carry out the administration of the property. *Allwood v. Haywood*, 1 H. and C. 745, *Games v. Hannington*, 22 Beav. 627. M

(c) Since equity follows law, the Court will not deprive the tenant for life of the deeds in his possession, in the absence of special trusts requiring the possession of the deeds by the trustees. *Taylor v. Sparrow*, 4 Giff. 703; 9 Jur. N.S. 1226. N

(d) If a tenant for life in equity is not the settlor, he cannot, by suppressing the settlement, make a title to the fee simple. So, the Court can order the deeds to be delivered to him. *Langdale v. Briggs*, 8 De G. M. and G. 391. O

(e) This is done subject to the right of the remainderman to production and inspection to a reasonable degree. *Davis v. Dysart*, 20 Beav. 405. P

(f) The Court will require him not to part with them without the trustees' consent. It will also require him to produce them, on all reasonable occasions, to the trustees. *Re Burkby's Settled Estates*, 42 Ch. D. 621. Q

(g) Generally an equitable tenant for life, let into possession by Court, will be given the custody of title-deeds in a proper case. *Re Wyther*, (1893) 2 Ch. 369. R

(13) Long residence abroad—Effect.

(a) The fact of long residence abroad, of a tenant for life, is no reason for ordering the deeds into Court. *Leather v. Leather*, 5 C.D. 221. S

(b) It is otherwise if he had, on a previous occasion, taken the deeds abroad, apparently for evading the jurisdiction. *Jennes v. Morris*, 1 Ch. 803. T

I.—“Right to inspect....accounts, etc.”—(Concluded).

(14) Probability of showing deeds to adverse claimants.

The probability of a tenant for life showing the deeds to claimants adverse to those in remainder is no reason for depriving him of the title-deeds.

Leather v. Leather, supra.

U

(15) Mortgagees of life-estate—Custody of deeds.

Mortgagees of the life-estate have a right to insist on the retention of the deeds by trustees. *Re Newen*, (1894) 2 Ch. 297.

Y

(16) Joint owners, rights of.

(a) When one of the persons interested obtains deeds relating to two or more portions of an estate, or to an estate held by tenants in common, the others are not entitled to obtain them from him. *Buckhurst's case*, 1 Co. Rep. 100; *Wright v. Robotham*, 33 C.D. 108.

W

(b) The reason for the above is that no one can show a better title to have them than he has. (*Ibid.*)

X

(c) If trustees commit the documents of title to one among themselves and allow him to receive the income, their conduct can be justified. *Cottam v. Eastern Railway Co.*, 1 J. and H. 247.

Y

(d) The reason for the same is that the deeds relating to the trust must be held by some one trustee and not by *all* trustees, unless they are deposited with bankers or placed in a box secured by a number of different locks, of which each trustee should hold one of the keys, and negligence cannot be imputed to trustees for not taking such precautions as these. See *Agnew*, p. 272 (*Ibid.*)

Z

(e) When the documents are given as security for money, possession by one of the same is no implied authority, from the co-trustee, to him who holds them, to receive the principal amount secured. (*Ibid.*)

A

(17) Hindu law—Karta—Managing member—Liability to account.

A managing member of a joint Hindu family is bound to render an account of his management to his co-sharers, and he is liable to a suit if he refuses to do so. And such suit will lie, even if the parties suing were minors during the period for which the account is asked. 5 B.L.R. 347 (F.B.).

B

58. The beneficiary, if competent to contract, may transfer his

Right to transfer
beneficial interest.

interest¹, but subject to the law for the time being in force as to the circumstances and extent in and to which he may dispose of such interest²:

Provided that, when property is transferred or bequeathed for the benefit of a married woman, so that she shall not have power to deprive herself of her beneficial interest, nothing in this section shall authorize her to transfer such interest during her marriage.

(Notes).

Scope of section.

- “The section speaks only of purchasers.” Griffith's Trusts Act, p. 116.

C

1.—“Beneficiary . . . transfer his interest.”

(1) Assignability of an equitable interest—General rule.

Generally an equitable interest in a beneficiary is assignable, even when it amounts to nothing more than a mere possibility. *Courthope v. Heyman*, Cart. 25; *Goring v. Bickerstaff*, 1 Ch. Ca. 8. **D**

(2) Beneficiary competent to contract.

A beneficiary, who is competent to contract, may alienate his interest in the trust-property. *Lord Cornbury v. Middleton*, 1 Ch. Ca. 211. **E**

(3) Alienation with or without intervention of trustee

The right of a beneficiary to alienate his interest may be exercised by him, with or without the intervention of a trustee. *Philips v. Brydges*, 3 Ves. 127. **F**

(4) Right of beneficiary's assignee to sue trustee directly

(a) Any assignee of the interests of a beneficiary may call on the trustee to clothe the equitable interest with the legal estate. *Goodson v. Ellison*, 3 Russ. 583. **G**

(b) On the trustee refusing to do so, he may get such interest in the trust property conveyed to him by himself suing the trustee, if necessary, without even making his assignor, the beneficiary, a party to the suit. (*Ibid.*) **H**

(5) Right to sue trustee for breach, inalienable.

A mere right of suing the trustee for his breach of the trust cannot be so assigned as to render the assignee competent to institute the suit by himself. *Hull v. Boyle*, 4 L.R. Eq. 260, but, see, *Re Park Gate Wagon Co*, 17 Ch D. (C A.) 234. **I**

(6) Restriction against alienation.

A general—, being in contravention of the policy of the law, will not operate to prevent the *cestui que trust* from parting with his interest. *Snowdon v. Dales*, 6 Sim. 524. **J**

(7) Married woman under coverture.

A—cannot, as a beneficiary, make a valid assignment of her interest in the trust. *Eller*, 17 Eq. 409. **K**

(8) Conveyance, how effected—Person other than European British subjects.

In the case of persons, other than European British subjects, a conveyance, by the *cestui que trust*, of his interest, may be made by word of mouth. See Agnew, p. 274. **L**

(9) Conveyance, how effected—European British subjects.

(a) Prior to the passing of the Statute of Frauds, the transfer of an equitable interest might have been made orally *Lewin*, 11th Ed., p. 869. **M**

(b) According to S. 9, Statute of Frauds, “all grants and assignments of any trust or confidence are required to be in writing, signed by the party granting or assigning the same, or else, are utterly void.” (*Ibid.*) **N**

(c) “This is still in force, at least in the Presidency towns, so far as regards European British subjects.” Agnew, p. 274. **O**

(d) “A writing is all that is necessary, but it is the practice to employ the same species of instrument and the same form of words in the transfer of equitable as of legal estates.” *Lewin*, p. 869. **P**

1.—“*Beneficiary....transfer his interest*”—(Concluded).

(10) **Precautions which purchaser should never dispense with.**

- (a) A purchaser of an equitable interest in *choses in action* “should make enquiries of the trustee or debtor, whether the equity or claim of the vendor has been made the subject of any prior incumbrance.” Lewin, 11th Ed., p. 885. **Q**
- (b) “Upon the execution of the assignment, the purchaser should himself give notice of his own equitable title to the trustee or debtor, by means of which he will gain precedence of all prior incumbrancers who have not been equally diligent, and will prevent the postponement of himself to subsequent incumbrancers more diligent than himself; and of course the trustee or debtor will be personally responsible, if, after such notice he parts with the fund to any person not having a prior claim.” *Hodger v. Hodger*, 2 Keen 704. Lewin, p. 886. **R**

2.—“*But subject... interest.*”

(1) **Assignee taking subject to all equities.**

- (a) The assignee of the interest of a *cestui que trust* “is bound by all equities affecting it.” Lewin, p. 871. **S**
- (b) This might be more accurately expressed by stating that the owner of an equity by assignment is bound by all equities affecting that which is assigned. (*Ibid.*) **T**
- (c) “The rule does not mean that the assignee of an equity shall be bound by all the equities affecting the assignor, as between him and previous purchasers or incumbrancers under the assignor, but only by such as affect the assignor as between himself or his debtor and any persons not claiming under himself. The assignor can indisputably only give what he himself has, but as between two persons claiming through him, a conflict of right may well arise.” Lewin, p. 872. **U**
- (d) The assignee in general has use of the rights of assignor only, whether the latter be a trustee or other qualified owner. 6 Bom. H.C.R.O.C. 59. **V**
- (e) Where a purchaser of an estate for value takes with notice, actual or constructive, he is bound by such trust to the same extent and in the same manner as the person from whom he purchased. (*Ibid.*) **W**

(2) **Transfer of greater right.**

No one can transfer to another a greater right than he possesses. *Justinian's Digest*, 17, 50, 54. **X**

(3) **Assignee bound by state of accounts at time of assignment.**

On a creditor transferring his debt to a person, who has no notice that part of it has been discharged, the latter is bound by the state of the accounts at the time of the assignment. *Ord v. White*, 3 Beav. 357. **Y**

(4) **Trustee indebted to trust—Assignee bound by debt.**

On a trustee, who has a beneficial interest and is also indebted to the trust, assigning his interest to a stranger, the assignee is bound by the debt. *In re Knapman*, 18 Ch. D. 300. **Z**

(5) **Assignee liable to equities arising from actual payments.**

An assignee is not only liable to equities arising from a set-off, but also to those arising from actual payments. *Cavendish v. Geaves*, 24 Beav. 163. **A**

2.—“*But subject . . . interest*”—(Concluded).(6) **Liabilities of assignee to equities subsequently attaching.**

The assignee of the interest of a *cestui que trust* “may even be liable to equities subsequently attaching.” Agnew, p. 274. **B**

(7) **Equitable mortgage—Transfer.**

On a person, taking an equitable mortgage with notice of a prior charge, transferring his mortgage to another having no notice of the prior charge, the latter will be bound by equity with which the former was affected. *Ford v. White*, 16 Beav. 120. **C**

(8) **Equitable interest obtained by fraud—Transfer.**

Where X mortgages or sells an equitable interest to a certain person, such mortgage or sale being fraudulently obtained, and the latter transfers it to a third person, that third person, whether he has notice of the fraud or not, takes it subject to X's equity to have the mortgage or sale set aside. *Barnard v. Hunter*, 2 Jur. N.S. 1213. **D**

(9) **Legacy making good loss.**

Where an executor assigns his reversionary legacy, and is subsequently charged with a *devastavit*, the legacy must make good the loss occasioned thereby. *Morris v. Luvew*, 1 Y. and C.C.C. 380. **E**

(10) **Set-off as affecting assignee.**

The assignee of the interest of a *cestui que trust* “takes subject to any right of set-off which may exist.” See Agnew, p. 274. **F**

(11) **Mutual demands to be in respect of same rights.**

(a) The equity jurisdiction in respect of set-off is mainly, if not entirely, confined to cases where one or both of the cross demands is or are of an equitable kind. Lewin, 11th Ed., p. 875. **G**

(b) No set-off is allowed, even in equity, when the mutual demands are between the parties in different rights.

E.g.—“If A give a legacy to B, and appoint C his executor, or executor and residuary legatee, B may sue C for the legacy, and C cannot set off a debt owing by B to C not as executor, but in C's own right.” *Whitaker v. Rush*, Ant. 407; see Agnew, p. 275. **H**

(12) **Benamidar—Beneficial owner—Purchaser's liability.**

Where there is a person in possession of an estate other than the nominal owner, i.e., the person in whose name the title-deed is, a purchaser, although he may be a purchaser for value, is bound to inquire what is the nature of his possession. If he does not think fit to do so, he takes subject to the rights of the person in possession. 22 W.R. 8; see, also, 6 Bom. H.C.R.O.C 59. **I**

General.(1) **Notice to trustee.**

(a) Notices should be given to the trustees themselves. See Lewin, p. 893. **J**

(b) As between assignor and assignee, no notice to the trustee is necessary for the completion of an assignment. *Burn v. Carvalho*, 4 M. and Cr. 702. **K**

General—(Continued).

- (c) Nor is it required for rendering the assignment by the beneficiary effectual as against subsequent volunteers. *Justice v. Wynne*, 12 Ir. Ch. Rep. 289. **L**
- (d) Nor is it required, even when the assignment is voluntary. *Donaldson v. Donaldson*, Kay 711. **M**
- (e) The assignee from the beneficiary must give notice of the assignment to the trustee, if the assignee is to claim priority over the subsequent transfers by the beneficiary. *Dearle v. Hall*, 3 Russ. 1; A.D. 1823. **N**
- (f) In the absence of a notice, to the trustee, of a prior charge created by the beneficiary, a purchase by the trustee himself from the beneficiary will prevail over the charge. *Phapps v. Lovegrove*, 16 Eq. 80. **O**
- (2) **Notice given to one of several co-trustees.**
- (a) A—is sufficient as against all subsequent encumbrancers, during that trustee's life-time. *Lewin*, p. 888. **P**
- (b) But this may not be of use after the death of that trustee. *Duncombe*, (1893) A.C. 369. **Q**
- (3) **Notice to trustees' solicitors.**
- Where notice is given to trustees' solicitors, it will be of no avail, unless the solicitors are by express or implied authority permitted to receive it. *Saffron Walden, Second Benefit Building Society v. Rayner*, 14 Ch.D. (C.A.) 406. **R**
- (4) **Active and passive trustee—No difference.**
- Law makes no difference between an active and a passive trustee. So if notice to one trustee is enough, it may be given to the person who is not the active trustee. *Smith v. Smith*, 2 Cr. and M. 233. **S**
- (5) **Assignor's assignee one of trustees—Effect.**
- (a) The rule requiring notice is not only to prevent the trustee from parting with the fund, but is also and more especially for enabling future purchasers to ascertain prior incumbrances. So, if the assignor (the party beneficially interested) is one of the trustees, the notice which he has is not enough, as it is so strongly his interest to suppress the assignment. *Lloyd's Bank v. Pearson*, (1901) 1 Ch. 865. **T**
- (b) Not so, if the assignee be one of the trustees. The notice he has is sufficient. *Browne v. Savage*, 4 Drew. 635. **U**
- (6) **Notice to all trustees—All die—Later incumbrancer's notice to new trustee.**
- (a) Where notice is given to any of the trustees, and all of them die, a second incumbrancer giving notice to the succeeding trustees gains priority. *Phipps v. Lovegrove*, 16 L.R. Eq. 80. **Y**
- (b) But in *re Wasdale*, (1899) 1 Ch. 163, it has been held that the priority gained by the sending of notice to all the trustees will not be lost on account of the subsequent changes in the trusteeship. **W**
- (7) **Notices given simultaneously.**
- When notices are given simultaneously, incumbrances rank according to their respective dates. *Calisher v. Forbes*, 7 L.R. Ch. App. 109. **X**

General—(Concluded).

(8) Trust fund consists of shares of company.

- (a) If —, the notice may be served on the Secretary. *Ex parte Stright*, Mont. 502. **Y**
- (b) Notice to a director and the actuary, *held* sufficient. *Ex parte Watkins*, 1 Men. and Ayr. 689. **Z**
- (c) Notice to a Board of Directors, *held* sufficient. *Re Agra Bank*, 3 L.C. Ch. App. 555. **A**

(9) Fund being in Court—Stop-order.

- (a) In the case of a fund in Court, the person, who first gets a stop-order to restrain the transfer of the fund, will have priority. *Greening v. Beckford* 5 Sim. 195. **B**
- (b) But an incumbrancer getting the first stop-order will not have priority over another, who has given regular notice to the representative of the trust before the payment of money into Court. *Livesey v. Harding*, 23 Beav. 141. **C**
- (c) Nor will he get priority over a prior incumbrancer, of whose incumbrance he had notice while he made his advance. *Re Holmes*, 29 Ch. D. (C.A.) 786. **D**
- (d) But notice of prior incumbrance acquired after advance was made, but before the stop-order is received, will not affect the right to priority. *Mutual Life Assurance Society v. Langley*, 32 Ch. D. 460. **E**
- (e) If money is paid into Court by the trustees, notice may still be served on the trustee; but the right course will be to get a stop-order. *Mutual Life Assurance Co. v. Langley*, 26 Ch. D. 686. **F**

(10) Case where there is no trustee.

Where, at the time of the stock, there is no express trustee, notice should be served on the bank where the stock is standing or other holder. *Elty v. Bridges*, 2 Y. and C.C.C. 486. **G**

(11) Constructive notice through solicitor.

A person will have to be imputed with constructive notice of a trust known to his solicitor, even where the latter has been guilty of certain frauds in respect of the trust. *Boursot v. Savage*, 2 Eq 134. **H**

(12) Solicitor's position as creditor under insolvency, no notice of such insolvency.

The mere fact that a solicitor to certain trustees happened to be also a creditor under an insolvency was not sufficient to impute notice of the insolvency to the trustee. *Brown's Trusts*, L.R. 5 Eq 88. **I**

(13) Notice necessary to raise constructive trust in third party.

What would constitute constructive notice to an actual trustee may not be sufficient for the purpose of raising a constructive trust in a third party. *Williams v. Williams*, 17 Ch. D. 437. **J**

(14) *Qui prior est tempore potior est jure*—General rule.

"As between persons having only equitable interests, if their equities are in all other respects equal, priority of time gives the better equity." Lewin, p. 899. **K**

(15) Testamentary disposition.

Equitable interests in lands are transmissible by devise. *Cornbury v. Middleton*, 1 Ch. Ca. 211. **L**

59. Where no trustees are appointed, or all the trustees die, disclaim, or are discharged, or where, for any other reason, the execution of a trust by the trustee is or becomes impracticable, the beneficiary may institute a suit for the execution of the trust, and the trust shall, so far as may be possible, be executed by the Court until the appointment of a trustee or new trustee.

(Notes).

1.—“Right to sue for execution of trust.”

(1) The maxim ‘equity never wants a trustee’

The Court of Equity never wants a trustee, and whenever there is no trustee to execute a trust, the Court will regard as trustee the person in whom the legal estate is vested or the legal representative. *Salisbury v. Bagot*, 2 Swanst. 608. **M**

(2) Trust not to fail for want of trustee.

A trust property created, either by the author's declaration or by implication of law, will not be allowed to fail for want of a trustee. *White v. Baylor*, 10 Ir. R. Eq. 53. **N**

(3) Trustee dying during testator's life-time, etc.—Effect.

(a) Where property is bequeathed to trustees on certain trusts, and the trustees die in the testator's life-time, the trust is not defeated. *Moggridge v. Thackwell*, 3 B.C.C. 528. **O**

(b) So also if the trustees disclaim. *Buckhouse v. Buckhouse*, V.C. of Eng. 20 Dec. 1844. **P**

(c) So also if the trustees are incapable of taking. *Sonley v. Clockmaker's Company*, 1 B.C.C. 81. **Q**

(d) So also if the trustees fail from any other cause. *Attorney-General v. Stephens*, 3 M. and K. 347. **R**

(e) So also if the testator, directing a sale of his lands for certain purposes, omits to name a person to sell. *Pitt v. Pelham*, Freem, 134. **S**

(f) “It is a general rule that, whenever the intention of the settlor can be clearly collected, and there is no want of consideration, the Court will follow the estate into the hands of the legal owner, not being a purchaser for value without notice, and compel him to give effect to the trust by the execution of the proper assurance.” Lewin, 11th Ed., p. 1048. **T**

(4) Trustee bound to execute not permitted to use discretion.

Where the power given is one which it is the duty of the party to execute—made his duty by the requisition of the will—, as a trustee for the exercise of the power, he will not be given the discretion whether to exercise it or not, and the Court will not permit his negligence, accidents, or other circumstances to disappoint the interests of those for whose benefit he is called upon to execute it. *Brown v. Huggs*, 8 Ves. 574. **U**

(5) Execution of trust, suit for.

On the failure of the trustee, it is competent for the *cestui que trust* to institute a suit for executing the trust, and the trust will be executed by the Court till the appointment of trustees. See Agnew, p. 282. **V**

I.—“Right to sue for execution of trust”—(Concluded).

(6) Author's intention carried out

The Court, while executing a trust, takes into consideration the intention of the author of the trust, and acts up to such intention, it does not go beyond it, save in cases where the parties have the same common interest or those who have an adverse interest are consenting. *Agnew*, p. 283. **W**

(7) Court exercising power retrospectively.

And the Court, in some cases, assumes the jurisdiction of exercising the power retrospectively, *e.g.*, in directing past maintenance. *Edwards v. Grove*, 2 De Gif and J. 222. **X**

(8) Court carrying trust, though difficult.

(a) The difficulties or impracticabilities of carrying the trust into execution will not prevent the Court from taking up the trust. *Pierson v. Huggs*, 5 Ves. 505. **Y**

(b) The Court will carry the trust into execution however arduous it is. (*Ibid*) **Z**

(9) Trustee's non-execution not prejudicial.

Where the Court by any possibility can execute the trust, trustee's non-execution will not prejudice the *cestui que trustent*. *Brown v. Huggs*, 5 Ves. 505. **A**

(10) Mode of execution.

(a) IF SETTLOR HAS PRESCRIBED A RULE, COURT WILL ADOPT IT.

Where the settlor has prescribed a rule for the trustees, or where he has given power to trustees to act upon a certain state of facts, of which the Court can be informed by evidence and judge as well as the trustees could, the Court can make the judgment as well as the trustees, and, when informed by the evidence, can judge what is just and equitable. *Glover v. Manwaring*, 2 Ves. 87. **B**

(b) PROCEDURE OF COURT IN ABSENCE OF RULE BY SETTLOR.

If no rule has been given by the settlor, the Court cannot act on mere caprice, but will execute the power by the most reasonable and intelligible rule admitted by the circumstances. In such a case, the Court will generally proceed on the maxim “Equality is equity.” *Doyley v. Attorney-General*, 2 Eq. Ca. Ab. 195. **C**

(c) TRUST NOT PERMITTING EQUAL DIVISION—PROCEDURE.

Where the nature of the trust does not permit of equal division, the Court will still proceed on the maxim that, “if by any possibility the trust can be executed, the Court will do it.” See *Agnew*, p. 284. **D**

(d) GENERAL INTENTION WHEN WILL BE CARRIED OUT

“When there appears a general intention in favour of individuals of a class to be selected by another person, and the particular intention fails from that selection not being made, the Court will carry into effect the general intention in favour of the class.” *Per Lord Cottenham, Burrough v. Philcox*, 5 M. and Cr. 92. **E**

(11) Appointment of ‘judicial trustee.’

Under the Trustee Act of 1896, the Courts in England have the discretion to appoint, either the official solicitor of the Court or some other competent person, as a judicial trustee. *Butcliffe*, 2 Ch. 352; *Douglas v. Balam*, 2 Ch. 749. **F**

60. The beneficiary has a right (subject to the provisions of the Right to proper instrument of trust) that the trust-property shall be properly protected and held and administered by proper persons and by a proper number of such persons.

Explanation I ².—The following are not proper persons within the meaning of this section :—

A person domiciled abroad, an alien enemy; a person having an interest inconsistent with that of the beneficiary; a person in insolvent circumstances; and, unless the personal law of the beneficiary allows otherwise, a married woman and a minor ³.

Explanation II.—When the administration of the trust involves the receipt and custody of money, the number of trustees should be two at least

Illustrations.

4 (a) A, one of several beneficiaries, proves that B, the trustee, has improperly disposed of part of the trust property, or that the property is in danger from B's being in insolvent circumstances, or that he is incapacitated from acting as trustee. A may obtain a receiver of the trust-property.

5 (b) A bequeaths certain jewels to B in trust for C. B dies during A's lifetime, then A dies. C is entitled to have the property conveyed to a trustee for him.

(c) A conveys certain property to four trustees in trust for B. Three of the trustees die. B may institute a suit to have three new trustees appointed in the place of the deceased trustees.

(d) A conveys certain property to three trustees in trust for B. All the trustees disclaim. B may institute a suit to have three trustees appointed in place of the trustees so disclaiming.

6 (e) A, a trustee for B, refuses to act, or goes to reside permanently out of British India, or is declared an insolvent, or compounds with his creditors, or suffers a co-trustee to commit a breach of trust. B may institute a suit to have A removed and a new trustee appointed in his room.

(Notes).

1.—“Right to proper trustees.”

(1) Principle of this section and S. 61.

(a) Since the beneficiary's estate depends for its continuance on the faith and integrity of the trustee, “it is reasonable that the beneficiary, whose interest is thus materially concerned, should be allowed, by all practicable means, to secure himself against the occurrence of any act of misconduct.” See Lewin, p. 1061. G

(b) The first of the rights of a beneficiary securing him against the occurrence of any act of misconduct is his right to have the custody and administration of the estate confided to the care ‘both of proper persons and of a proper number of such persons.’ (*Ibid.*) H

I.—“*Right to proper trustees*”—(Continued).(2) **Death of trustee in testator's lifetime.**

Where a trustee, who is originally appointed by will, happens to die in the lifetime of the testator, the beneficiary is at liberty to have the property better secured by a conveyance to an express trustee for himself (provided such a course would be for his interest). *Dodkin v. Brunt*, 6 L.R. Eq. 580. I

(3) **Trustee dying after acting—Right to new trustees.**

The beneficiary, on the reduction of the original number of trustees by deaths, is at liberty to have the property restored to its original security, by calling for the appointment of new trustees in the place of those who have died. *Buchanan v. Hamilton*, 5 Ves. 722. J

(4) **Beneficiary in remainder, right of.**

For having the proper number of trustees filled up, even a beneficiary who is only entitled in remainder is at liberty to institute proceedings. *Filnay v. Howard*, 2 Dru. and War. 490. K

(5) **Removal of trustee, if to the advantage of trust.**

(a) The jurisdiction of a Court of Equity for removing a trustee is ancillary to its principal duty to see that the trust is properly executed. See Lewin, p. 1063. L

(b) Even in the absence of proof of any misconduct on the part of the trustees, it is competent to the Court to remove them, where it is of opinion that the existing trustees would not properly execute the trust. *Letterstedt v. Broers*, L R. 9 Ap. C.A. 371. M

(6) **Inherent jurisdiction of Court to appoint trustees**

If a testator, without appointing a trustee at all, has only appointed executors, the Court will assert an inherent jurisdiction of its own for appointing trustees to take charge of the fund. (*Ibid.*) N

(7) **Duty of Court in appointing new trustees.**

(a) In appointing new trustees, the Court must have regard to the wishes of the author of the trust (whether actually expressed in the instrument, or plainly deducible from it), to the nature of the trust, and the question by whose instrumentality it can best be carried into execution. *Re Tempest*, Ch. A. 485. O

(b) The Court will appoint trustees who will prove themselves impartial to all the beneficiaries. (*Ibid.*) P

(c) In appointing new trustees, the Court would not give them a power of appointing other trustees. See Lewin, p. 1065. Q

(8) **Trustee not to be removed in the following instances.**

(a) A trustee cannot be dismissed capriciously without any reasonable cause being shown. *O'Keefe v. Calthorpe*, 1 Atk. 18. R

(b) Nor can he be removed on account of his refusal, from honest motives, to exercise a power at the request of a tenant for life. *Lee v. Young*, 2 Y. and C. C.C. 532. S

1.—“*Right to proper trustees*”—(Concluded).

(c) Nor can he be dismissed on account of the dissension between himself and one of the beneficiaries. *Forster v. Dares*, 4 De. G.F. and J. 133. **T**

(d) Nor can mere misunderstandings between the trustee and the beneficiary justify the removal of the trustee, who cannot be dismissed capriciously for mere mistakes. *Attorney-General v. Coopers' Company*, 19 Ves. 187. **U**

(e) Nor can a trustee be excluded from the administration of the trust-property, on account of the former abuse of the trust by *shebait* or trustee. 14 M.I.A. 289 = 10 B.L.R. 19 = 17 W.R. 41. **V**

(9) **Former trustee removed for misconduct—Charge incurred in appointing new trustee.**

The former trustee removed on the ground of his misconduct will have to bear the charges incurred in appointing a new trustee. *Ex parte Greenhouse*, 1 Madd. 92. **W**

(10) **Suit for removal of trustee—Circumstances of general malice cannot be stated.**

In a suit for the removal of a trustee, it will not be scandalous or impertinent to challenge a trustee for misconduct, or to impute corrupt motives or vindictive conduct in the administration of trust, but it will be impertinent, and may be scandalous, to state circumstances of general malice or personal hostility. *Earl of Portsmouth v. Fellows*, 5 Madd. 450. **X**

2. — “*Explanation I.*”(1) **Trustees who are not proper persons.**

(a) A trustee who has refused to act. *Maggeridge v. Grey*, Nels. 42; *Wood v. Stane*, 8 Price 13. **Y**

(b) A trustee who has become so circumstanced that he cannot effectually execute the office, as, for example, a trustee going abroad to reside permanently. *O'Reilly v. Alderson*, 8 Hare 101; *Re Earl of Stamford*, (1896) 1 Ch. 238. **Z**

(c) A trustee of a chapel entertaining views which are not in consonance with the intention of the founder. *Attorney-General v. Pearson*, 7 Sim. 290, 309. **A**

(d) A trustee who has become an insolvent. *Bainbrigge v. Blair*, 1 Beav. 495. **B**

(e) A trustee who has misconducted himself in any manner. *Mayor of Coventry v. Attorney-General*, 7 B.P.C. 235. **B1**

(f) A trustee who desires to deal with the trust property for his own personal advancement. *Ex parte Phelps*, 9 Madd. 357. **C**

(g) A trustee who has suffered a co-trustee to commit a breach of trust. *Ex parte Reynolds*, 5 Ves. 707. **D**

(h) A trustee who has absconded on a charge of forgery. *Millard v. Eyre*, 2 Ves. Jun. 94. **E**

N.B.—In these and like cases, the beneficiary can compel his removal, and have a new trustee appointed in his stead. See Lewin, p. 1062. **F**

2.—“Explanation 1” —(Concluded).

(2) “Proper,” meaning of, in “proper persons.”

The term “proper” does not mean, at least in the case of charities, “the most proper.” *Lancaster Charities*, 7 Jur. N. S. 596. **G**

(3) Alien friend.

An alien friend may be appointed under special circumstances. See *Whit. Stokes*, Vol. I, p. 862. **H**

(4) One of co-beneficiaries, whether can be appointed trustee

When there are co-beneficiaries, one of them ought not to be appointed trustee, if this can be avoided. 17 Jur. 988. **I**

3.—“Unless the personal law of the beneficiary allows otherwise.. minor.”

“The words — were inserted, because, in Hindu and Muhammadan families, a minor son often succeeds to property, burthened with a trust for dependent relations of his father, and a married woman is sometimes made by her father trustee for herself and her son or daughter.” See *Whit. Stokes*, Vol. I, pp. 828, 829. **J**

4.—“III. (a).”

This illustration is based on *Scott, v. Becher*, 4 Price 346; see, also, S. 54, cl. (a), Specific Relief Act; *Whit. Stokes*, Vol. I, p. 963. **K**

5.—“III. (b).”

This illustration is based on *Brown v. Higgs*, 8 Ves. 570. **L**

6.—“III. (c).”

(1) This illustration contains the principles deducible from the following cases noted *supra*, viz., *Wood v. Stone*, 8 Price 613; *O'Reilly v. Alderson*, 8 Hare 101; *Bambrigg v. Blair*, 1 Beav. 495; *Ex parte Reynolds*, 5 Ves. 707. **M**

(2) Order refusing to remove trustee, not appealable

No appeal lies from an order of a Court declining to remove a trustee. 19 A. 181. **N & O**

61. The beneficiary has a right that his trustee shall be compelled to perform any particular act ¹ of his duty as such, and restrained from committing any contemplated or probable breach of trust ².

Right to compel to any act of duty.

Illustrations.

(a) A contracts with B to pay him monthly Rs. 100 for the benefit of C. B writes and signs a letter declaring that he will hold in trust for C the money so to be paid. A fails to pay the money in accordance with his contract. C may compel B on a proper indemnity to allow C to sue on the contract in B's name.

3 (b) A is trustee of certain land, with a power to sell the same, and pay the proceeds to B and C equally. A is about to make an improvident sale of the land. B may sue on behalf of himself and C for an injunction to restrain A from making the sale.

(Notes).

1.—“Compelled to perform any particular act of duty.”**(1) Principle of section.**

(a) See notes under S. 60, *supra*.

P

(b) This section declares the right of the beneficiary to have his trustee compelled to perform any particular act of duty. See Lewin, p. 1069.Q

(c) Since a trustee is bound to protect the trust estate, if he fails in his duty, the beneficiary may institute a suit to compel him to act. *Crossley v. Crowther*, 9 Hare 386.

R

(2) Right to damages from trustee—Jurisdiction of Court.

The jurisdiction of the Court to compel the trustee at the instance of the *cestui que trust* is not affected by the right of the latter to realise consequential damages from the trustee. *Corporation of Ludlow v. Greenhouse*, 1 Bligh. N.S. 17

S

(3) Right to compel collection of outstandings.

It is open to the beneficiary to revoke his consent to the trustee's permitting the funds to remain outstanding, and compel him thereon to get the same collected. *Knby v. Mash*, 3 Y. and Col. 95.

T

(4) Right to compel suit against trespasser.

“If the legal estate in the hands of the trustee be disturbed by a stranger, the *cestui que trust*, though he may not institute legal proceedings in the name of a trustee without his authority. (*Crossley v. Crowther*, 9 Hare 384 and *Besley v. Besley*, 37 Ch. D. 648), may oblige the trustee, on giving him a proper indemnity, to lend his name for asserting the legal right. *Ex parte Kearsley*, 19 Q.B.D. 1.” Lewin, p. 1069.

U

(5) Suit against trespassers.

Where a trustee refuses to bring an action against a person who has trespassed on the trust property, the beneficiary may, by giving an indemnity, compel the trustee to allow his name to be used in an action for the purpose. *Foley v. Burnell*, 1 B.C.C. 277.

Y

(6) Suit by *cestui que trust* in his own name.

In equity, a *cestui que trust* is not entitled to maintain a suit in his own name, merely on account of the refusal by the trustee to sue. *Sharpe v. San Paulo Railway Co.*, 8 L.R. Ch. 597, 609.

W

(7) Right of legatee or next-of-kin to sue.

Similarly a mere refusal by a legal representative to sue for outstanding assets will not by itself justify a residuary legatee or next-of-kin in bringing a suit against the legal representative and the alleged debtor to the estate. See *Yeatman v. Yeatman*, 7 Ch. D. 210.

X

(8) Circumstances disabling trustee from suing.

There must be special circumstances disabling the trustee from suing (*e.g.*, where his conduct regarding the estate is impeached), or rendering it inconvenient that he should do so. *Beningfield v. Baxter*, 12 App. Cas. 167.

Y

1.—“Compelled to perform any particular act of duty”—(Concluded). •

(9) Power of Court to require security.

Whenever the Court is of opinion that the trustee, if allowed to continue to act without giving security, would not properly execute the trust, it may at once require him to give security for his good faith in the management. *Kneeling v. Child*, Rapt. Finch 360. Z

(10) Beneficiary securing contingent interest—Possibility on possibility.

(a) A beneficiary, having an existing interest, whether vested or contingent, can, on reasonable cause shown, have his interest secured. *Bartlett v. Bartlett*, 4 Ha. 631. A

(b) Not so a beneficiary who has a mere possibility of a future event. See *Lewin*, p. 1071. B

2.—“Restrained from committing....breach of trust.”

(1) Beneficiary's right to obtain injunction against trustee.

On the beneficiary satisfying the Court that the trustee is going to do an act in violation of the duty, as such, he can get an injunction to restrain the trustee from performing such act. *Balls v. Strutt*, 1 Hare 146. C

(2) Injunction when will be granted.

Where the nature of the trust-property or the conduct of the trustee renders it desirable, the Court will grant an injunction to protect the trust-property. *Everett v. Prythergh*, 12 Sim. 365. D

(3) Act irremediable—Right to injunction

A beneficiary can obtain an order for injunction, if the act contemplated would, if done, be irremediable. See *Corporation of Ludlow v. Greenhouse*, 1 Bligh N.S. 57. E

(4) Damage not being irreparable.

The same is the case, even though the damage would not be irreparable; for it is not always necessary that the damage should be irreparable. See *Webb v. Earl of Shaftesbury*, 7 Ves. 487, 488, *Anon. case*, 6 Madd. 10. F

(5) Injunction in favour of beneficiary partially interested.

Not only beneficiaries exclusively interested in the trust, but even those who hold only a partial interest therein jointly with others, can, in proper cases, obtain injunctions against the trustees. *Scott v. Becher*, 4 Price 346; see *Dance v. Goldingham*, 8 Ch. Ap. 902. G

(6) Injunction against insolvent trustee—Poverty or bad character of executor—Effect.

(a) An injunction may be obtained as against an insolvent trustee, preventing him from dealing with the trust funds. *Mansfield v. Shaw*, 3 Madd. 100; *Gladdon v. Stoneman*, 1 Madd. 143 (note). H

(b) So also an injunction against the administration of the assets by an executor proved to be of bad character, drunken habits and great poverty, may be obtained. *Howard v. Puperia*, 1 Madd. 143. I

(c) Similar relief can be obtained against one, who has misappropriated assets and become bankrupt. *Bowen v. Phillips*, (1897) 1 Ch. 174. J

2.—“*Restrained from committing....breach of trust*”—(Concluded).

(d) But there will be no interference by the Court, unless it is proved that the assets are wasted. *Lewin*, 11th Ed., p. 1072. K

(e) Simple poverty of an executor is no ground for the Court to interfere. *Everet v. Pryterch*, 12 Sim. 365; but see *Howard v. Pupera*, *supra*. L

(7) **Appointment of receiver by Court.**

In the case of conflict between one set of trusts and another, the proper course for the Court is to appoint a receiver. *Talbot v. Scott*, 4 K. and J. 139. M

3.—“*III. (b).*”

See Act I of 1877, S. 54, III. (f). *Whit. Stokes*, Vol. I, p. 864. M1

62. Where a trustee has wrongfully bought trust-property ¹, the beneficiary has a right to have the property declared subject to the trust or re-transferred by the trustee, if it remains in his hands unsold ², or if it has been bought from him by any person with notice of the trust, by such person ³. But in such case the beneficiary must re-pay the purchase-money paid by the trustee, with interest ⁴ and such other expenses (if any) as he has properly incurred in the preservation of the property ⁵; and the trustee or purchaser must (a) account for the nett profits of the property ⁶, (b) be charged with an occupation-rent, if he has been in actual possession of the property ⁷, and (c) allow the beneficiary to deduct a proportionate part of the purchase-money if the property has been deteriorated by the acts or omissions of the trustee or purchaser ⁸.

Wrongful purchase by trustee.

Nothing in this section—

⁹ (a) impairs the rights of lessees and others who, before the institution of a suit to have the property declared subject to the trust or re-transferred, have contracted in good faith with the trustee or purchaser; or

¹⁰ (b) entitles the beneficiary to have the property declared subject to the trust or re-transferred where he, being competent to contract, has himself, without coercion or undue influence having been brought to bear on him, ratified the sale to the trustee with full knowledge of the facts of the case, and of his rights as against the trustee.

(Notes).

1.—“*Where a trustee....bought....property.*”

(1) **Trusts for sale—General rule.**

(a) It is not competent to a trustee for sale to purchase the trust-estate, for he would, in fact, be purchasing from himself; and a valid sale requires the existence of a vendor and vendee. *Godefroi*, p. 392 (3rd Ed.). N

1.—“Where a trustee....bought....property”—(Continued).

(b) “The rule is, not that a trustee cannot buy from his *cestui que trust*, but that he shall not buy from himself. If a trustee will so deal with his *cestui que trust* that the amount of the transaction shakes of the obligation that attaches upon him as trustee, then he may buy.” *Ex parte Lacey*, 6 Ves. 625. **O**

(c) The rule is this:—“A trustee, who is entrusted to sell and manage for others, undertakes, in the same moment in which he becomes a trustee, not to manage for the benefit and advantage of himself. It does not preclude him from bargaining that he will no longer act as a trustee. The *cestuis que trust* may by a new contract dismiss him from that character, but even then, the transaction by which they dismiss him might be watched with infinite and the most guarded jealousy; and for this reason, that the law supposes him to have acquired all the knowledge that a trustee may acquire, which may be very useful to him, but the communication of which the Court can never be sure he has made, when entering into the new contract by which he is discharged.” (*Ibid*) **P**

(d) “It is clear undisputed law that a trustee for the sale of property cannot himself be the purchaser,” *Williams v. Scott*, (1900) A.C., p. 503. **Q**

(2) Business—Property wrongfully purchased by trustee—Terms upon which sale will be set aside.

Where the subject-matter of purchase by trustee is a business, as a going concern, and where the trustee, subsequent to his purchase, carries it on under his own personal direction, on the sale being set aside, the trustee would be entitled to all outgoing for wages of assistants, expenditure of stock, etc., but no salary for his own management will be given. *Re Norrington*, 13 Ch. D. (C.A.) 654. **R**

(3) Retirement of trustee—How it affects his right to buy.

On the retirement of the trustee from the office, the trustee is not prevented from buying the trust-estate. *Re Boles and British Land Co.*, (1909) 1 Ch. 244. **S**

(4) Advantage to trustee, not necessary.

In cases of wrongful purchase by a trustee, it is not necessary that he must be shown to have gained some advantage by the transaction, as by a subsequent sale at a profit, or that he himself purchased the property at an undervalue. *Whichcote v. Lawrence*, 3 Ves., p. 750. **T**

(5) Wrongful purchase through others—if valid.

(a) THROUGH AGENTS.

Where the trustee purchases the trust-estate, not in his name, but in the name or through the agency of another person, the purchase is invalid. *Campbell v. Walker*, 5 Ves. 678. **U**

(b) THROUGH CO-TRUSTEE.

A similar purchase by a trustee through his co-trustee is invalid. *Hall v. Noyes*, 3 Ves. 748. **V**

(c) PURCHASE THROUGH CHILDREN OR RELATIONS.

(i) Nor is the trustee allowed to enter into a like transaction, in the name of his children. *Gregory v. Gregory*, G. Coop. 201; Jac. 681. **W**

(ii) But the mere fact that the actual purchaser is related to the trustee is not, of itself, any ground for impugning the sale. *Coles v. Trecothick*, 9 Ves. 234. **X**

1. "Where a trustee....bought....property"—(Continued).

(6) Purchases at public auction by trustees.

— are impeachable similarly for, if bidders see the seller himself bidding against them, it is a discouragement for the bidders to bid. *Ingle v. Richards*, 28 Beav. 361. **Y**

(7) Auction sales—When trustees allowed to bid.

(a) NON-INTERFERENCE BY TRUSTEE—*cestui que trust—sui juris*.

Where the trustee keeps himself aloof from the auction sale, leaving the matter to be done by the *cestui que trust* alone, all of whom are *sui juris*, he may become the vendee. *Coles v. Trecothick*, 9 Ves. 234. **Z**

(b) INFANTS—COURT'S LEAVE.

If the persons interested in the estate be infants, the trustee can bid only with the previous leave of the Court. *Farmer v. Dean*, 32 Beav. 327. **A**

(c) CIRCUMSTANCES UNDER WHICH COURT'S LEAVE WOULD BE GIVEN.

Only where all parties give their consent, and all other chances of procuring a sale have been exhausted, liberty to bid will be given for the trustee. *Tennant v. Trenchard*, 4 Ch. 547. **B**

(8) Severance of relationship of trustee and *cestui que trust*—Right to purchase.

(a) The trustee must have shaken off his disability by the consent of the *cestui que trust*, freely given after full information, and must have bargained for the right to purchase. *Chalmers v. Bradley*, 1 J. and W. 51. **C**

(b) The trustee must have communicated all his knowledge, gained in his position as trustee, to the beneficiary, in addition to giving a fair price. (*Ibid.*) **D**

(9) Trustees *de son tort*—Purchase.

Where the trustees are erroneously treated as being such by all parties, and where they buy a share from a beneficiary in distress, or at an inadequate consideration, the purchase will not be upheld. *Plowright v. Lambert*, 52 L T. 646. **E**

(10) Trustee to preserve contingent remainders.

No disability to purchase attaches to a— *Parkes v. White*, 11 Ves. 209 (226). **F**

(11) Trustee for "separate use."

Nor is a trustee for the separate use of a married woman prevented from purchasing. *Parkes v. White*, 11 Ves. 209. **G**

(12) Trustee to bar dower.

A trustee to bar dower could purchase the trust property. *Naylor v. Winch*, 1 S. and S. 567. **H**

(13) "Bare trustee"—Right of purchase.

A "bare trustee," whose only duty is to convey to his beneficiary, is not disabled from purchasing the trust estate. *Pooley v. Ruetter*, 4 Drew. 189. **I**

1.—“Where a trustee....bought....property” —(Concluded).

(14) Purchase by executors and administrators.

Where an executor buys the assets of his testator with the assent of all parties interested, his purchase will not be disturbed. *Watson v. Toone*, 6 Madd. 153. J

(15) How such purchase must be made.

(a) They must act openly, and without any concealment, or it would be set aside, even after a long lapse of time. *Benningfield v. Barter*, 12 A C. 167. K

(b) They must show that they have paid the highest price obtainable. *Champeon v. Rigby*, 1 R. and M. 539, *Baker v. Read*, 18 Bea. 398. L

(c) They must also show that persons interested in the estate knew every matter in respect of the value of the property. *Smedley v. Varley*, 23 Bea. 356. M

(16) Co-owners and tenants in common.

—do not stand in any fiduciary relation towards each other. *Kennedy v. De Trafford*, 1897, A.C. 180, 189. N

(17) Tenants for life, Mortgagees, Agents, Counsels, Partners, Solicitors, Guardians, etc.

Principles, similar to those which apply to purchase by trustees, are applicable to purchases by—, see Godefroi, pp. 399 to 412. O

2.—“The beneficiary....hands unsold.”

(1) Suit to set aside purchase by trustee—Costs.

Where the trustee has wrongfully bought the trust property, and the *cestui que trust* subsequently institutes a suit for setting aside the purchase, the trustee, as a general rule, will have to bear the costs. *Sanderson v. Walker*, 13 Ves. 601, *Hall v. Hallett*, 1 Cox 141, *Croze v. Ballard*, 2 Cox 253. P

(2) Delay in bringing suit for recovery of trust property—Costs.

(a) Where there has been great delay on the part of the beneficiary in resorting to his remedy as against the trustee, who has wrongfully bought the trust estate, the Courts would not grant to the *cestui que trust* the costs of suit, although he succeeds therein. *Attorney-General v. Lord Dudley*, G. Coop. 146. Q

(b) In cases where, on account of the delay in instituting the suit, the Court dismisses the suit of the beneficiary, the trustee will not be entitled to recover his costs from the plaintiff. *Gregory v. Gregory*, G. Coop. 201. R

(3) Setting aside sale—Right of beneficiary to recover specific estate.

The *cestui que trust*, if he chooses it, may have the specific estate reconveyed to him by the trustee. *Ex parte James*, Ves. 337 at 351; *Aberdeen v. Aberdeen*, 2 App. Cas. 544; *Ex parte Barret*, 10 Ves. 400. S

2.—“*The beneficiary... hands unsold*”—(Continued).

(4) **Discharge of trustee from sale.**

The purchase by the trustee being wrongful, he is to be discharged from the sale at once, and the Court will make an order immediately, in respect of the re-conveyance of the property to the beneficiary, upon immediate repayment of the money to the trustee. *Ex parte Bennett*, 10 Ves. 400, 401. T

(5) **Purchase in one lot by trustee—Like remedy to *cestui que trust* in re-sale.**

(a) Where the trustee has bought in one lot, the beneficiary, at time of re-sale, cannot insist on a re-sale of the property in different lots. *Ex parte James*, 8 Ves. 351, 352. U

(b) If the beneficiary be very particular about the re-sale of the property in different lots, he must pay the trustee his principal and interest, and then, as absolute owner of the property, he may sell according to his pleasure. (*Ibid.*) Y

(6) **When *cestui que trust* loses his right to recover.**

Where part of the consideration paid by trustee for the purchase is not money, and the beneficiary has, by his subsequent dealings, put it out of his power to restore to the trustee the benefits derived from him, the beneficiary cannot set aside the transaction. *Re Wonsaun*, 51 L.J. Ch. 669; *Dunsdale v. Dunsdale*, 3 Dr. 556, 577. W

(7) ***Cestui que trust*, when could ask for re-sale.**

Where the assignee in bankruptcy has become the purchaser, the beneficiary may claim, not a re-conveyance of the specific estate, but a re-sale of the property, and the Court would grant an order therefor, under its directions. *Lewin*, p. 571. X

(8) **Terms of such re-sale.**

The bidding must begin at the price at which the trustee purchased, and if there is an higher bid, the sale should be knocked down, and if there are no bidders, the trustee should be held to his bargain. *Lester v. Lester*, 6 Ves. 633, *Ex parte James*, 8 Ves. 351. Y

(9) **Setting aside of sale—Time therefor.**

Where the beneficiary elects to set aside the transaction, he must institute legal proceedings therefor within a reasonable time. *Baker v. Read*, 18 Beav. 398. Z

(10) **Acquiescence of *cestui que trust*—Effect of.**

Where the *cestui que trust* acquiesces in the wrongful purchase by the trustee for a long time, such acquiescence raises a reasonable presumption that the purchase was, in all respects, a fair one, and that the relation between the trustee and the *cestui que trust* had been previously abandoned. *Parkes v. White*, 11 Ves. 226, See *Morse v. Royal*, 12 Ves. 374. A

(11) **Setting aside sale within reasonable time—Reasonable time, what.**

(a) In one case, 7 years was held to be a reasonable time within which the sale must be set aside. *Baker v. Read*, 18 Beav. 398. B

2.—“*The beneficiary...hands unsold*”—(Continued).

- (b) In another case, a suit to set aside a sale after the expiry of 20 years was dismissed. *Price v. Byrn*, 5 Ves. 681; *Barwell v. Barwell*, 34 Beav. 371. **C**
- (c) Relief has been refused after an acquiescence of 18 years and 17 years. *Gregory v. Gregory*, G. Coop. 201; *Baker v. Read*, 18 Beav. 398. **D**
- (d) Even after the expiry of more than 10 years, sale has been ordered to be re-opened, where the executor had purchased in the name of trustees for himself, and the transaction was vitiated by disguise and concealment. *Watson v. Toone*, 6 Madd. 153. **E**

(12) **Equitable relief to the beneficiary—Effect of laches.**

Where there had been laches on the part of the beneficiary in resorting to his remedies, and he could not offer any justifiable excuse therefor, such laches would be a bar to his remedies. *Oliver v. Court*, 8 Price, 167, 168. **F**

(13) **Time allowed to a class of persons.**

- (a) A class of persons—such as creditors—must, generally, have a longer time allowed them for setting aside the sale. *Whitchote v. Lawrence*, 3 Ves. 740; *Doswell v. Coaks*, 27 Ch.D. (C.A.) 424. **G**
- (b) A class of persons cannot be expected, in the prosecution of their common interest, to exert the same vigour and activity, as individuals would do in the pursuit of their exclusive rights. *Hall v. Noyes*, 3 Ves. 748. **H**

(14) **Laches, when bar to equitable relief.**

- (a) Laches, on the part of beneficiary, would operate as a bar to his remedy, only when it is shown that he knew that the trustee was the purchaser. *Randall v. Harrington*, 10 Ves. 423. **I**
- (b) Because, when the *cestui que trust* continues ignorant of the real state of the facts, he cannot be found fault with for not having “quarrelled with the sale.” (*Ibid*), *Chalmer v. Bradley*, 1 J and W. 51. **J**

(15) **Suits to set aside wrongful purchases by trustee—Onus of proof.**

- (a) In such suits, the burden of proving the strict fairness of the transaction, and the disclosure of all information which they have acquired in their character of trustees, shall be on them. *Gray v. Warner*, 16 Eq. 577. **K**
- (b) Where the trustee had been unwilling to enter into the transaction, and the beneficiary being *sui juris* had suggested the transaction, and threatened to enforce it, the burden is shifted from the trustee to the beneficiary. *Luff v. Lord*, 34 Beav. 220. **L**

(16) **Reasonable time for setting aside sale—Circumstances to be considered.**

In considering what may be regarded as a reasonable time, the Court must take into consideration the disadvantage to which the purchaser may be subjected by reason of the deaths of witnesses, and also the circumstances of each particular case. *Barwell v. Barwell*, 34 Beav. 371. **M**

(17) **Delay as bar to relief—Considerations by Court.**

Where delay is brought in as a bar to relief, the length of the delay, the nature of the acts done in the interval, the degree of diligence which might reasonably be required, and all the circumstances of the case must be duly considered by the Court. *Re Cross*, 20 C.D. 109. **N**

2.—“The beneficiary....hands unsold”—(Concluded).

(18) Express trust—Delay—Effect of.

In the case of an express trust, mere delay may be a good defence, irrespective of the statute of Limitation. *Ex parte Gallard* (1897) 2 Q.B. p. 15. **O**

(19) Delay by beneficiary—Poverty, how it affects.

Poverty of the beneficiary is a thing to be taken into consideration by the Court, but cannot be considered to be necessarily an excuse for delay in impugning a purchase by a trustee. *Roberts v. Tunstall*, 4 Ha. 257; *Oliver v. Court*, 8 Pr. 167. **P**

(20) Successful impeachment of sale.

For successfully impeaching a purchase by the trustee, the beneficiary must proceed without delay, as laches will bar his title to such relief. *Hercy v. Dinwoody*, 2 Ves. 87. **Q**

3.—“If it has been....trust, by such person.”

(1) Sale by trustee to one with notice—Right of beneficiary.

Where the trustee has sold the property, which he himself has wrongfully purchased, to another with notice of the trust, as against the latter also, the *cestui que trust* has a right to recover the specific estate. *Dunbar v. Tredenwick*, 2 B & B 304. **R**

(2) Purchase from trustee with notice.

A purchaser from the trustee cannot maintain his bargain, if he had notice of the disability of the person from whom he derives his title. *Cookson v. Lee*, 23 L.J. Ch. 473. **S**

(3) Sale by trustee to another without notice—Beneficiary's remedy.

(a) If, before the commencement of the legal proceedings by the beneficiary to recover the estate from the trustee, the latter has sold the estate to one, who took it without notice of the trust, the beneficiary's remedy will only be to compel the trustee to account for the difference of price. *Fox v. Mackreath*, 2 B.C.C. 400; *Randall v. Errington*, 10 Ves. 423. See also *Lord Hardwicke v. Vernon*, 4 Ves. 411. **T**

(b) The trustee would be liable to so account to the beneficiary with interest at 4 per cent. *Hall v. Hallett*, 1 Cox. 134. **U**

(4) Purchase of shares by trustee—Subsequent sale by him to another—Beneficiary's remedy

(a) Where a trustee had purchased some shares (subject to trust) and subsequently conveyed them to X at a considerable advance of price, held that the trustee must account for every advantage he had made by the transaction, and is not liable to replace the specific shares. *Hall v. Hallett*, 1 Cox. 134. **Y**

(b) The *cestui que trust* has no such election of choosing between the specific thing and the advantage made of it. (*Ibid.*) **W**

4.—“But in....trustee, with interest.”

(1) Payment of purchase-money by trustee into Court—Setting aside sale—Equity.

(a) Where a trustee had paid in a portion of the same amount into Court, which had been invested in the funds, and he claimed the benefit of the rise of stock when the sale was set aside, held that he could receive his purchase-money only with interest. *Ex parte James*, 8 Ves. 337. **X**

4.—“*But in . . . trustee, with interest*”—(Concluded).

(b) In a like case, if there had been a fall of the stock, he cannot be compelled to bear the loss. (*Ibid.*). Y

(2) **Setting aside sale—Liability of beneficiary to repay purchase-money.**

Where the sale is set aside at the instance of the beneficiary, the latter is liable to repay the price at which the trustee bought, with interest at 4 per cent. *Watson v. Toone*, 6 Madd. 153, *Ex parte James*, 8 Ves. 337 (351). Z

(3) **General rule in respect of rate of interest.**

(a) The general rule was that an executor or trustee was charged 4 per cent. at simple interest on moneys which he retained—except in cases of active breach of trust or misconduct—as distinguished from mere negligence—where the higher mercantile rate of 5 per cent. was charged. *Re Lambert*, 1897, 2 Ch., p. 180. A

(b) But in recent years, in England, the Court has reduced the rate of interest from 4 per cent. to 3 per cent. in ordinary cases. *Barclay v. Andrew*, 1899, 1 Ch., p. 686. B

(4) **Extenuating circumstances—How affect the rate of interest.**

The Court will deal leniently in charging interest, with parties who can put forward extenuating circumstances, such as mere want of judgment, absence of improper motive or personal advantage, the onerous character of the trusts, or the like. *Tebbs v. Carpenter*, 1 Madd. 290. C

5.—“*Expenses . . . incurred . . . preservation . . .*”(1) **Costs of repairs.**

Where, subsequent to his wrongful purchase, the trustee has effected improvements and repairs on the trust-property which prove substantial and lasting, or which have a tendency to bring the property to a better sale, he will be allowed the expenses which he has incurred in respect of such repairs and improvements. *Ex parte Hughes*, 6 Ves. 624, *Ex parte Bennet*, 10 Ves. 400, *Yorks Building Co. v. Mackenzie*, 8 B.P.C. 42. D

(2) **Repairs and improvements—Equities on setting aside sale—How affected by fraud.**(a) **REPAIRS—COSTS OF, ALLOWED.**

Where transactions between the parties have been vitiated by fraud, on the setting aside of sale, allowance will be made to the trustee in respect of necessary repairs. *Baugh v. Price*, 1 G. Wils. 320. E

(b) **IMPROVEMENTS—COSTS OF, ALLOWED.**

In one case of improvements having been effected by trustee, where fraud was present, the Court even allowed the expenses of the improvements. *Oliver v. Court*, 8 Price 172. F

(c) **IMPROVEMENTS, COSTS OF, NOT ALLOWED.**

(i) In another case of a like nature, where there was actual fraud, no allowance for improvements was made. *Kenney v. Browne*, 3 Ridg. 518. G

(ii) “If a man has acquired an estate by rask and abominable fraud, and shall afterwards expend the money in improving the estate, is he, therefore, to retain it in his hands against the lawful proprietor? If such a rule should prevail, it would justify a proposition that the common equity of the country was “to improve the right owner out of the possession of his estate.” (*Ibid.*) See *Stratton v. Murphy*, 1 Ir. Rep. Eq. 361. H

5.—Expenses....incurred....preservation...”—(Concluded).

(3) Trustee incurring expenses— Proper expenses. what are.

See notes on S. 36, *supra*.

I

(4) Foundation of trustee's right to expenses.

(a) The right of the trustees to all costs and expenses properly incident to the execution of the trust is founded upon the contract between the author of the trust and his trustees, and is similar to that given to a mortgagee by virtue of his contract of mortgage. *Cotterell v. Straton*, 8 Ch., p. 302.

J

(b) In modern times, the Court will not discourage persons from becoming trustees, by inflicting costs, etc., upon them, if they have done their duty, or even if they have committed an innocent breach of trust. *Turner v. Hancock*, 20 C.D. 303.

K

(5) Misconduct of trustees—How it affects his right to costs.

Where there is proof of misconduct, the costs, expenses, etc., are in the discretion of the Judge, who may, or may not, allow them, according to the circumstances. *Charles v. Jones*, 33 C. D. 80.

L

6.—“ And the trustee or purchaser....property.”

(1) Setting aside sale—Liability of trustee.

(a) Where a wrongful purchase of the trust-property by trustee is set aside, the trustee should account to the beneficiary for the profits of the estate, during the time when the property was in his possession. *Ex parte James*, 8 Ves. 351, *Ex parte Lacey*, 6 Ves. 630.

M

(b) Similar liability attaches to a vendee from the trustee in such cases. (*Ibid.*)

N

(2) Liability of trustee or purchaser to account for profits, but not with interest.

But either of them need not pay interest on the profits. *Siekstone and Haergh Moore Coal Co. v. Edey* (1900), 1 Ch. 167.

O

7.—“ Be charged....occupation rent....property.”

Liability to pay occupation rent.

Where the trustee or purchaser from him has been in actual possession of the trust-property (after the wrongful purchase), either of them is liable to be charged with an occupation rent, for the period during which such wrongful occupation continued. *Ex parte James*, 8 Ves. 351.

P

8.—“ Allow the....of trustee or purchaser.”

Deterioration of property wrongfully purchased—Liability of trustee, etc.

If, by acts of the trustee, the property should have deteriorated in value, when the purchase-money is repaid to the trustee on the setting aside of the sale, the latter must be content to receive his purchase-money with a proportionate reduction. *Ex parte Bennet*, 10 Ves. 401; *Baugh v. Price*, 1 Wils. 320.

Q

9.—“ Clause (a).”

Rights of lessees and bona fide transactions protected.

Where the estate is re-conveyed to the beneficiary, the re-conveyance cannot prejudice the titles and interests of lessees and others, who have entered into transactions with the trustee *bona fide* before the institution of the suit. *York Buildings Company v. Mackenzie*, 8 B.P.C. 42.

R

10.—“Clause (b).”

(1) Confirmation of sale by *cestui que trust*.

It is open to the beneficiary to ratify the sale to the trustee by an express and actual confirmation. *Morse v. Royal*, 12 Ves. 355. S

(2) Confirmation by beneficiary—Subsequent annulment, if allowed

(a) Where the beneficiary elects to confirm the sale, he is estopped from annulling his own act, on the ground of no adequate consideration. *Roche v. O'Brien*, 1 B. and B. 353. T

(b) After having once chosen to ratify the sale to the trustee, by express confirmation of it, the beneficiary cannot question the same again. *Morse v. Royal*, 12 Ves. 355. U

(3) Confirmation—Requisites of.

(a) PARTY TO BE “SUI JURIS.”

The confirming party must be *sui juris*, not labouring under any disability, as infancy or coverture. *Campbell v. Walker*, 5 Ves. 678. Y

(b) ACT OF CONFIRMATION—TO BE A DELIBERATE ONE.

(i) The confirmation must be a solemn and deliberate act. *Morse v. Royal*, 12 Ves. 355; *Wood v. Downes*, 18 Ves. 120. W

(ii) So, where fraud has vitiated the original transaction, the confirmation thereof is watched by the Court with the utmost strictness, and will not be allowed by the Court except on clear proof. *Morse v. Royal*, 12 Ves. 373. X

(c) NO “SUPPRESSIO VIRI” OR “SUGGESTIO FALSI.”

There must be complete absence of *suppressio viri* or *suggestio falsi*, and the beneficiary should be made acquainted with all the material circumstances of the case. *Murray v. Palmer*, 2 Sch. and Lef. 486. Y

(d) FULL KNOWLEDGE OF LEGAL EFFECTS OF CONFIRMATION.

The confirming party should be fully aware of the legal effects of the confirmation. *Murray v. Palmer*, 28 Ch. and Lef. 487; *Waters v. Thorn*, 22 Beav. 547; *Caun v. Caun*, 1 P.W. 727. Z

(e) CONFIRMATION TO BE DISTINCT AND INDEPENDENT.

The confirmation should be wholly distinct from, and independent of, the original contract. *Wood v. Downes*, 18 Ves. 128. A

(f) NO COERCION OR UNDUE INFLUENCE.

The confirmation must not be wrung from the beneficiary by distress or terror. *Crowe v. Ballard*, 3 Bro. C.C. 117 and 2 Cox. 257; *Roche v. O'Brien*, 1 B. and B. 380. B

(g) CONFIRMATION—TO BE JOINT ACT OF WHOLE BODY.

If the *cestuis que trust* be a class of persons, the confirmation must be the joint act of the whole body. *Sir G. Colebrook's case*, 5 Ves. 622; *Ex parte Lacey*, Id. 628. C

(4) Concurrence in breach of trust by *cestui que trust*.

(a) Active concurrence by a *cestui qui trust* in a breach of trust is a bar to his claim to sue in respect of it. *Walker v. Symonds*, 3 Sw. 164; *Brice v. Stokes*, 11 Ves. 319. D

[10.—“*Clause (b)*”—(Concluded).]

- (b) Concurrence would be a bar, if the *cestui que trust* was aware of every fact which would show that the act in question was a breach of trust. *Buckeridge v. Glassey*, Cr. and Ph. 135. **E**

(5) Condoning—Estops beneficiary.

Where a beneficiary condones the trustee committing a breach, the former is estopped from suing in respect of the breach. *Evans v. Benyon*, 37 C.D. 329. **F**

63. Where trust-property comes into the hands of a third

Following trust-property—into the hands of third persons ;

person inconsistently with the trust¹, the beneficiary may require him to admit formally, or may institute a suit for a declaration that the property is comprised in the trust.²

Where the trustee has disposed of trust-property, and the money or other property which he has received therefor can be traced in his hands³ or the hands of his legal representative or legatee⁴ the beneficiary has, in respect thereof, rights as nearly as may be the same as his rights in respect of the original trust-property.

Illustrations.

(a) A, a trustee for B of Rs. 10,000, wrongfully invests the Rs. 10,000 in the purchase of certain land. B is entitled to the land.

(b) A, a trustee, wrongfully purchases land in his own name, partly with his own money, partly with money subject to a trust for B. B is entitled to a charge on the land for the amount of the trust-money so misemployed.

(Notes).**1.—“Where trust....third person....trust.”***** (1) Volunteer—Following the estate into the hands of.**

(a) Where the alienee of the trust estate is a volunteer, the estate may be followed into his hands, irrespective of his having had notice of the trust or otherwise. *Manswell v. Manswell*, 2 P.W. 678. **G**

(b) The fact that he paid no consideration for the conveyance induces the Court to introduce a fiction (viz.) that he had notice of the trust, while as a matter of fact he had none. *Lewin*, p. 1075. **H**

(2) Purchase of the estate with notice—Liability of purchaser

(a) Where the property is conveyed to one for full consideration, and the vendee entered into the transaction with notice of the trust—whether the notice be actual or constructive, the vendee cannot have a better title than the person of whom he took the conveyance. *Boursot v. Savage*, 2 L.R. Eq. 134 ; *Durbar v. Tredennick*, 2 B. and B. 319 ; *Daniel v. Davidson*, 16 Ves. 249. **I**

(b) His purchase will not be of any validity whatever, for the reason that he throws away his money voluntarily, and of his own free will, knowing full well of the right of some other person to the property. *Mead v. Lord Orrey*, 3 Atk. 238. **J**

1.—“Where trust....third person....trust”---(Concluded).

- (c) A person, purchasing property with the knowledge of the existence of the trust relating to it, is in the position of the original trustee so far as regards limitation, and cannot therefore claim the benefit of that law. *Lutfum v. Begogan*, 5 W.R. 120. **K**

(3) Purchase of the estate without notice—if valid.

Where a *bona fide* purchaser has no notice, either expressly or constructively, then he takes a good title, which cannot be impugned. *Burgess v. Wheate*, 1 Eden 195. **L**

(4) Payment of trust money into bank—Bank's liability—Beneficiary's right to follow.

(a) BANK MUST HAVE NOTICE.

If the Bank has notice (either direct, or by reasonable inference from facts) that the property or money is being wrongfully used, the bank is liable. *Thomson v. Clydesdale Bank* (1893) A.C. 282. **M**

(b) NEGOTIABLE INSTRUMENTS.

Where a banker takes a negotiable instrument in good faith for value, he obtains a title against all the world. *Earl Sheffield v. London and Joint Stock Bank*, 13 A.C. 333. **N**

(c) KNOWLEDGE AS TRUST MONEY

In order to make the bankers liable, it must be shown that they received the money, knowing the same to be trust money. *Union Bank of Australia v. Murray Aginsley*, (1898) A.C. 693. **O**

(5) Stolen property—Right to follow.

Stolen property, or property purchased with the proceeds thereof, may be followed into the hands of the trustee in bankruptcy of the thief. *Ex parte Manchester and County bank*, 39 W.R. 303 (Eng.). **P**

(6) Trustees to preserve contingent remainders—Purchase from—Liability of purchaser.

A purchaser, whether voluntary or for value, from trustees to support contingent remainders, having notice of the trust, is liable to restore the land, since the conveyance is a clear breach of trust. *Gorges v. Pye*, 7 B.P.C. 221. **Q**

(7) Trustee—Alienations by—Limitation—Title of purchasers.

Where a suit brought by the beneficiary to set aside, as fraudulent, certain alienations made by the trustee, was dismissed by the lower Appellate Court, as barred by limitation, on the ground that more than 12 years had elapsed since the execution of such deeds of alienations, *held* :—

- (1) that this was not sufficient, and that the Court should have tried whether the purchasers were cognizant, at the time of their purchase, of a subsisting trust affecting the property; for, if so, they would have taken it subject to the trust, and would stand in the shoes of the original trustee, and would not be *bona fide* purchasers from trustees, entitled to the benefit of the Law of Limitation; and
- (2) that, if the trustee had power to make valid grants, the grantees would have a perfectly good title, if they took for valuable consideration without notice of the trust. 5 W.R. 120. **R S**

2.—“*The beneficiary...in the trust.*”(1) **Right to follow trust property—General rule.**

In every case in which the trustee has converted any part of the trust estate, as between the *cestui que trust* and the trustee, and all parties claiming under the trustee, all property, however it may be changed or altered in its nature or character, and all the fruit or profit accruing from it, continue subject to the trust, subject only to the requirement that the property so claimed to be trust property is capable of being identified as in fact acquired with, or shown to represent, the original trust estate. *Pernell v. Defell*, 4 D.M. and G. 372; *Re Oatway* (1903) 2 Ch. 356 (360); *Harris v. Truman*, 9 Q.B.D. 264. T U

(2) **Right to follow trust property—Ground of rule.**

The principle upon which this rule is based is that the trustee cannot assert any title of his own as against that of the *cestui que trust*, and that, unless he has dissipated the whole trust fund, in which event nothing remains subject to the trust, any property which can be traced into other property into which it has been converted remains subject to the trust, and the whole of the property, in case any part of it represents property of the trustee himself, is treated as belonging to the trust, except so far as he may be able to distinguish what is his own. *Taylor v. Plumer*, 3 M. and S. 562; *Lupton v. White*, 15 Ves. 431; *Cook v. Addison*, 7 Eq. 466; *Ex parte Barber*, 28 W.R. 522. Y

(3) **Right to follow trust property—Trustee in bankruptcy.**

The rule of following trust property applies against the trustee in bankruptcy, as fully as against the trustee himself, even when the bankrupt is about to abscond with the property together with other money of his own. *Frith v. Castland*, 2 H. and M. 417. W

(4) **Limitation—Whether a bar to equitable relief—Direct trust.**

(a) As between *cestui que trust* and the trustee in direct trusts, no length of time is a bar to equitable relief. *Bennett v. Colley*, 2 M. and K. 225 (232). X

(b) For, by reason of the privity existing between them, the possession of the one is considered to be the possession of the other also, there being no adverse title. *Wedderburn v. Wedderburn*, 22 Beav. 84. Y

(5) **Debt—Subject matter of trust—Limitation.**(a) **DEBT UNDER CONTRACT OR COVENANT.**

Where the subject matter of the trust is a debt under a contract or a covenant, it is always the case that, when the trustee is barred, the *cestui que trust* is barred also. *Stone v. Stone*, L.R. 5 Ch. App. 74; *Coleman v. Bucks and Oxon Union Bank* (1897) 2 Ch. 243. Z

(b) **NOTICE OF TRUST BY DEBTOR.**

But where the debtor borrowed the money as trust money, or knowing it to be such, he cannot set up the statute *Soar v. Ashwell* (1893) 2 Q.B. 390 (397). A

(6) **Fraud—Limitation—Equitable relief.**

(a) Any amount of time will not cover a fraud as long as it remains concealed. For, until the fraud is discovered, or until the fraud might with reasonable diligence have been discovered, the title to avoid the transaction cannot properly arise. *Blair v. Bromley*, 2 Ph. 354. B

2.—“*The beneficiary....in the trust*”—(Continued).

- (b) After discovery of the fraud, the trustee (as defendant) may take shelter under the statute. Then he may say (as a rejoinder to plaintiff) “You shall not bring the matter under discussion at this distance of time. It is entirely your own neglect that you did not do so within the period limited by statute.” *Hovendon v. Lord Annesley*, 28 Ch. and Lef. 634. C

(7) **Nature of such fraud.**

The fraud must be that of the person who set up the statute, or of some one for whose fraud he is in law responsible, and not that of a stranger. *Wallis v. Earl Howe*, (1893) 2 Ch. (C.A.) 545. D

(8) **Fraud, not to be subsequent to the accrual of cause of action.**

The fraud relied upon by the defendant should not be one committed subsequently to the time when the right of action first accrued. *Thorne v. Heard*, (1894) 1 Ch. 599 (605). E

(9) **Equitable relief—Bar from presumption.**

The Court, after a great length of time, will presume some act to have been done, which, if done, is a bar to the demand of equitable relief. *Pattison v. Hawksworth*, 10 Beav. 375; *Attorney-General v. Moore*, 20 Beav. 110, but see *Thomson v. Eastwood*, 2 A.C. 215 (216). F

(10) **Time within which the presumption is raised.**

- (a) The period within which the Court raises the presumption depends upon the circumstances of each particular case. *Eldridge v. Knott*, Cowp. 214. G
- (b) As a general rule, twenty years is the period within which the Court raises the presumption. (*Ibid.*) H
- (c) But where there is a statute fixing a specified period in respect of this presumption, the Court will not entertain a presumption within a less time than that fixed by the statute. (*Ibid.*) I

(11) **Ground of such presumption—Quieting possession.**

- (a) Generally such presumptions are made by Courts, not necessarily because they really believe what they presume, but for the purpose of quieting the possession. *Eldridge v. Knott*, Cowp. 215, J
- (b) “It is said you cannot presume unless you believe. It is because there are no means of creating belief or disbelief that such general presumptions are raised.” *Hallary v. Walker*, 12 Ves. 266. K

(12) **Presumption—Ignorance, mistake, distress—Effect of, on equitable relief.**(a) **IGNORANCE, MISTAKE.**

The Court cannot presume a person to have abandoned his right, so long as he remains in ignorance of it, or labors under a mistake. *Randall v. Errington*, 10 Ves. 427. L

(b) **DISTRESS—LACHES.**

The distress of one, so far as it accounts for his laches, will *pro tanto* weaken the foundation of the presumption. *Hillary v. Walker*, 12 Ves. 266; *Byrne v. Frere*, 2 Moll. 171, 178. M

2.—“The beneficiary....in the trust”—(Continued).

(13) Equitable relief—Presumption against a class of persons.

- (a) Where a class of persons release their right, the presumption cannot be made in the same way, as in the case of an individual. *Whitcote v. Lawrence*, 3 Ves. 752. **N**
- (b) For one, who has only an aliquot interest in the property, cannot be expected to pursue his remedy with the same spirit as if he were the exclusive proprietor. (*Ibid.*) **O**

(14) Bar to equitable relief from public or private inconvenience.

- (a) Where, on account of delay, the administering of relief would lead to great public or private inconvenience, the relief will not be granted to the beneficiary. *Attorney-General v. Mayor of Exeter*, Jac. 448. **P**
- (b) So, in an action for an account, a settlement may be presumed, where there is great delay and it is probable that most of the parties are dead, and the vouchers and receipts lost. *Hunton v. Davies*, 2 Ch. Rep. 44; *Pearson v. Belchier*, 4 Ves. 627; *Hercy v. Dinwoody*, 2 Ves. 87. **Q**

(15) Bar to equitable relief from laches of beneficiary.

- (a) Lapse of time or delay in suing, if not accounted for by disability or other circumstances, constitutes *per se* laches disentitling a person to relief from the Court. *Oliver v. Court*, 8 Price 167; see *Hercy v. Dinwoody* (2 Ves. 93); *Earl of Pomfret v. Lord Windsor*, 2 Ves. 472. **R**
- (b) So, where a plaintiff *cestui que trust* seeks to impeach a purchase by a trustee, a delay of less than 20 years may bar his title to relief. *Oliver v. Court*, 8 Price 167. **S**

(16) Acquiescence of beneficiary, a bar to relief—Direct acquiescence.

- (a) Where the act complained of was done with the full knowledge and express approbation of the *cestui que trust*, he will not be entitled to relief. *Kent v. Jackson*, 14 Beav. 367 (384). **T**
- (b) The reason is that a person cannot be allowed to seek relief against the very transaction to which he was himself a party. (*Ibid.*) *Styles v. Guy*, 1 Mac. and G. 427. **U**

(17) Acquiescence indirect, a bar to relief.

- (a) Where a person, having a right to set aside a transaction, stands by and sees another dealing with the property in a manner inconsistent with that right, and makes no objection, the Court will not relieve him. *Phillipson v. Gatty*, 7 Hare 516; *Blake v. Gale*, 31 Ch.D. 196; *Mills v. Fox*, 37 Ch.D. 153. **Y**
- (b) But where the breach of trust has been completed, without any knowledge or assent on the part of the person seeking relief, that can be no acquiescence in the strict sense of the word. *Lewin*, p. 1095. **W**

(18) Acquiescence—Definition of.

Acquiescence has been defined as “quiescence” under such circumstances that assent may be reasonably inferred from it, and is an instance of the law of estoppel by words or conduct. *Lewin*, p. 1095. **X**

2.—“*The beneficiary....in the trust*”—(Continued).(19) **Trustee committing breach—Remedy of beneficiary—Account of mesne rents and profits—When given.**

(a) ACCOUNT, INDEPENDENT OF ANY OTHER RELIEF.

An account of mesne rents and profits arising from the trust estate will be allowed, when the same is sought independently of the relief against the corpus of the land. *Lewin*, p. 1118. **Y**

(b) ACCOUNT, INCIDENTAL.

The account will also be allowed, if the same is prayed for as incidental or collateral to any other relief which the *cestui que trust* may claim. (*Ibid.*) **Z**

(20) **Account of mesne profits—Express trust.**

Against an express trustee, committing breach, as limitation does not run between trustee and *cestui que trust*, the account will be directed from the time when the rents were withdrawn. *Attorney-General v. Breiver's Company*, 1 Mer. 495; *Mathew v. Brise*, 14 Beav. 341. **A**

(21) **Following trust property into the hands of volunteer claiming under a trustee—Account of mesne profits.**

In such cases, the beneficiary, where he establishes his claim to the property, has a right to the mesne profits and rents from the very commencement of his title. *Kidney v. Cousmaker*, 12 Ves. 158. **B**

(22) **Account of mesne profits—General rule—English law.**

(a) Where the defendant is *bona fide* in possession, the account will be directed from the time of the accrual of the title. *Dormor v. Fortescue*, S.C. 3 Atk. 130. **C**

(b) But the account will not be carried back beyond six years before the institution of the suit. *Reade v. Reade*, 5 Ves. 744. **D**

(c) And where there has been great laches in bringing the suit, the Court will not direct an account beyond the date of the decree. *Acherley v. Roe*, 5 Ves. 565. **E**

(d) But in India, in a suit against an express trustee, an account of mesne profits for the whole period will be decreed, because S. 10 of the Limitation Act does not bar such suits. *Powell*, p. 277. **F**

(23) **Assignee of trustee—Liability of—Account of mesne profits.**

(a) ASSIGNEE—PRIMARILY LIABLE.

Where the trustee, in committing a breach, assigns the property to X, the latter must account for the mesne profits primarily. *Silkstone and Haigh Moor Coal Co. v. Edey*, (1900) 1 Ch. 167. **G**

(b) TRUSTEE WHEN LIABLE.

But where the assignee is insolvent, the trustee, who tortiously made the assignment, shall be answerable personally. (*Ibid.*) **H**

(24) **Attachment of property into which the trust estate has been converted.**

(a) If the trust estate has been tortiously disposed of by the trustee, the beneficiary may follow and attach the property that has been substituted, in the place of the trust estate, so long as the metamorphosis can be traced. *Taylor v. Plumer*, 3 M. and S. 575 at 582. **I**

(b) “An abuse of trust can confer no rights on the party abusing it, nor on those who claim in privity with him.” (*Ibid.*) **J**

2.—“*The beneficiary....in the trust*”—(Continued).

(25) **Right to follow chattels—when lost — English law.**

Even in the case of chattels, where they have been purchased in market overt, they cannot be recovered by the beneficiary. *Lewin*, p. 1125. **K**

(26) **Following trust property—Nature of evidence, for.**

In order to establish the right to follow the trust property into the property into which it has been converted, it is necessary to show clearly every transaction by which the original property has assumed its new form. *Harford v. Lloyd*, 20 Beav. 310. **L**

(27) **Right to follow after order to pay into Court.**

Where, on a breach of trust having been committed, the *cestui que trust* institutes an action, and an order therein has been passed by the Court directing the trustee to pay the money into Court, the beneficiary is not estopped from following the money into the unauthorised investments, if the order to pay in is not obeyed. *Francis v. Francis* (5 D. M. and G. (108)). **M**

(28) **Illegal trust—Right to follow, if applicable.**

The doctrine of following trust money is not applicable, where the purpose for which the trust is created is a fraudulent or illegal one, and where the *cestui que trust* permits the money to remain to the credit of the alleged trustee until after the rights of the creditors have supervened. *Re Great Berlin Steamboat Co.*, 26 C.L. 616, See *Barclay v. Pearson*, (1898) 2 Ch. 163. **N**

(29) **Purchase of property with trust funds—Election of beneficiary**

(a) Where the trustee commits a breach of trust by purchasing property with the trust funds, the beneficiary has a right to elect to take land purchased with the trust money, or to have a charge upon it. *Hisk v. Webb*, Pr. Ch. 84. **O**

(b) The beneficiary can elect to affirm the sale of land held in trust, and to follow the purchase-money. *Re Chapman*, (1898) 1 Ch. 101. **P**

¶(30) **No evidence to follow trust fund—Presumption of purchase under trust, when raised.**

Where there is no evidence to trace the trust fund into land, the Court will presume that a purchase has been made with the trust funds, where there is nothing to show that it was made with any other motive. *Lewis v. Madocks*, 17 Ves. 48, *Mathias v. Mathias*, 3 Sm. and G. 552. **Q**

(30-a) **Absence of resources with trustees to make purchase.**

Such presumption is also raised where the means of trustees are clearly not sufficient to have enabled them to make the purchase out of their own resources. *Ryall v. Ryall*, 1 Atk. 59. **R**

(31) **Nature of right to follow land.**

The right to follow trust money into land is an equity or equitable right or lien, as distinguished from an equitable interest or estate, and is subject to the rule that a subsequent equitable mortgagee, even without notice of it, is postponed to it on the ground of its priority in point of time. *Gave v. Cave*, 15 C.D. 639. **S**

2.—“*The beneficiary....in the trust*”—(Concluded).

(32) In what cases right to follow ceases.

- (a) Where the trustee has so dealt with the trust fund, as it can no more be distinguished or traced, the beneficiary's lien and his right to follow the property ceases out of necessity. *Ryall v. Roll*, 1 Atk. 168. **T**
- (b) “In order that the rule as to following trust-money should apply, there must be something specific, which is capable of being identified as that into which the trust-money has been converted.” *Re Hallett and Co.*, 2 Q.B. 237. **U**

(33) Debts barred as against trustee, barred also against beneficiary.

When a debt due from a third party, which is the subject matter of the trust, becomes barred as against the trustee, the *cestui que trust*, will also be barred in respect of it. *Stone v. Stone*, 5 Ch. Ap. 74. **Y**

(34) Invalid trust—Right to recover trust property—Limitation.

Under Art. 120, Sch. II, Limitation Act (1877), the right to recover property settled on invalid trusts accrues directly the property is conveyed to the trustee. 20 B. 511. **W**

3.—“*Where the trustee....his hands.*”

(1) Money, notes, etc.—Right to follow, when lost.

- (a) In the case of money, notes and bills, for the protection of commerce, they cannot be pursued, when they have passed into the hands of *bona fide* holders in circulation. *Collins v. Stunson*, 11 Q.B.D. 142. **X**
- (b) But money, notes and bills may be followed by the rightful owner, where they have not been circulated or negotiated, or if the person to whom they passed had express notice of the trust. *Verney v. Carding*, 18 Ch. and Lef. 345. **Y**
- (c) If money held by a person in a fiduciary character, though not as trustee, has been paid by him to his account at his banker's, the person for whom he paid it can follow it and has a charge on the balance in the banker's hand. *In re Hallett's estate*, 13 Ch. D. 696. **Z**
- (d) The only difference to be taken between money on the one hand and notes and bills on the other, is that money is not “earmarked” and so cannot be traced except under particular circumstances, but notes and bills, because they have a number and date, can, in general, be identified without any difficulty. *Ford v. Hopkins*, 1 Salk 283. **A**

(2) Trust money mixed with trustee's money—Right to follow.

- (a) Where money belonging to the trust has been mixed with the trustee's money, the *cestui que trust* is entitled to follow it into the hands of the trustee. *Pennell v. Deffell*, 4 De G. M. and G. 382. **B**
- (b) The reason is that, though the identical pieces of coin cannot be ascertained, yet, as there is so much belonging to the trust in general heap, the right to follow is not taken away. (*Ibid.*) **C**

(3) Misappropriation of trust-moneys—Bankruptcy of trustee.

Where a trustee misappropriates trust moneys, and he subsequently makes it good on the eve of a bankruptcy, it is not a fraudulent preference on

3.—“Where the trustee...his hands”—(Continued).

his part. *Ex parte Stubbins*, L. R. 17 Ch. D. 58; *Ex parte Taylor*, L. R. 18 Q. B. D. 295, *Sharpe v. Jackson* (1899) A. C. 419; *Prance and Gurrards' Trustee v. Hunsing*, (1897), 2 Q. B. 19; *Taylor v. London and County Banking Co.* (1901), 2 Ch. 231. **D**

(4) Breach of trust by trustee—Appropriation.

No trustee can acquire a title to trust property by an appropriation against the trust. 1 C.W.N. 265=19 A. 277=24 I.A. 10. **E**

(5) Money—Right to follow.

(a) In the case of money, there must be in fact a payment, since the doctrine of following depends upon identification of the subject-matter. *Re Hallet and Co.*, 1894, 2 Q.B.1). 237. **F**

(b) So, where money not actually received was credited to an account, the doctrine was held inapplicable. (*Ibid.*) **G**

(6) Money, right to follow—Executor.

A beneficiary cannot follow money into the hands of an executor, who has not improperly retained it in payment of his own debt, to the prejudice of a creditor of higher degree. *Re Fludger, Wingfield v. Erskine* (1898), 2 Ch. 562. **H**

(7) Persons standing in a fiduciary relation—Other than trustee.

(a) AGENTS, BAILEE, SOLICITOR.

All persons, standing in a fiduciary relation as the trustee—such as agents, bailees, solicitor, collector of rents, etc., are liable in the same way as a trustee. *Lyell v. Kennedy*, 14 A.C. p. 459 **I**

(b) BANKER.

So, where trust funds have been misapplied, and can be traced into particular investments, those investments will be charged with the amount of the trust funds so misapplied in the hands of a banker.

(c) STOCK BROKER.

Similar right exists, where the funds are in the hands of a stock broker. *Ex parte Cooke*, 4 C.D. 123. **J**

(d) CONSIGNEE.

In the case of a bailee or consignee, the rule is applicable, only where he is a factor in a fiduciary position with a duty to remit the proceeds of sale to his principal, and not where the consignee is one who receives goods from any one and trades on his own account, making advances on them. *Fiskham v. Peel*, 28 W.R. 941. **K**

(8) Trustee—Beneficiary committing breach—Assignment—Right of *cestui que trust* to follow.

(a) Where a trustee, having an interest in the trust fund, assigns his beneficial interest, and then commits breach by abstracting any part of the trust fund, the other beneficiary has a right to follow that portion of it which is comprised in the assignment. *Hopkins v. Goman*, 1 Moll. 561. **L**

(b) The reason is that the trustee could take no interest in the estate, while a breach of trust by him remains unsatisfied. *Morris v. Livie*, 1 Y. and C.C.C. 380. **M**

3.—“Where the trustee....his hands”—(Concluded).

- (9) **Confusion of trust stock with the trustee's own stock—Right of beneficiary to follow.**

Where a trustee, having stock of his own and similar stock held upon trust, sells part of it from time to time, and where, on his death, the stock in his name was found to be insufficient to answer the trust, the whole will be deemed as appropriated to the trust. *Annes v. Skellern*, 9 Jur. 122. **N**

- (10) **Trustee of two funds—Breach of trust in respect of one—Repairing breach at expense of another—Right of beneficiary to follow.**

Where a trustee of two funds, held on different trusts, commits breach in respect of one, and then restores one fund at the expense of another by payment into Court, the *cestui que trust* cannot follow the fund into the hands of those who have so received it, because the latter take it as purchasers for value without notice of the fraud, if as a matter of fact they had no such notice. *Thorncliffe v. Hunt*, 3 D. and J. 563. **O**

- (11) **Charitable trusts—Blending of trust funds by trustee—Right to follow.**

See *Andriens v. Mc Guffog*, 11 A.C. 313, *Provost of Edinburgh v Lord Advocate*, 4 A.C. 823. **P**

- (12) **Following money lent for special purpose.**

When money has been advanced for a particular purpose, such as the purchase of a business, there is a fiduciary duty so to apply it and where the borrower, without so applying, uses the same for his own purposes, it may be followed, to the extent of the balance remaining, if it can be traced, even against the trustee in bankruptcy of the borrower. *Gibert v. Conard*, 52 L. T. 54. **Q**

4.—“Or the hands of his legal representative or legatee.”

- (1) **Legal representative liable to the extent of assets.**

In England, in cases of breaches of trust by a trustee, the legal representative is liable to the beneficiary, to the extent of his assets, for the consequences of breach. *Devaynes v. Robinson*, 24 Beav. 86. **R**

- (2) **Right of beneficiary as against legatee of trustee.**

The assets paid up into the hands of the legatee of a defaulting trustee can be followed by the beneficiary, to make good the breach of trust. *Gillespie v. Alexander*, 3 Russ. 137. **S**

Saving of rights of certain transferees.

64 Nothing in section 63 entitles the beneficiary to any right in respect of property in the hands of—

¹ (a) a transferee in good faith for consideration without having notice of the trust, either when the purchase-money was paid, or when the conveyance was executed, or—

(b) a transferee for consideration from such a transferee².

A judgment-creditor of the trustee attaching and purchasing trust-property is not a transferee for consideration within the meaning of this section.

• Nothing in section 63 applies to money, currency-notes, and negotiable instruments in the hands of a *bona fide* holder to whom they have passed in circulation ³, or shall be deemed to affect the Indian Contract Act, 1872, section 108 ⁴, or the liability of a person to whom a debt or charge is transferred ⁵.

(Notes).

1. — “ Clause (a). ”

(1) **Purchase of trust-property by third persons—General rule.**

The general rule that a party to an illegal or fraudulent contract cannot derive any benefit from it obtains in the case of trusts. And all persons who obtain possession of trust funds, with a knowledge that their title is derived from a breach of trust, will be compelled to turn such trust funds in their hands. *Gray v. Lewis*, 8 L.R.Eq. 526 (543). T

(2) **Absence of notice at time of purchase—Discovery of trust at time of conveyance—Effect of.**

(a) Where the purchaser has no notice of the trust at the time of purchase, but afterwards discovers the trust, and obtains a cognizance from the trustee, he cannot take a valid title. *Sanders v. Dehew*, 2 Vern. 271. U

(b) In this case, notice of the trust at the time of conveyance converts the purchaser into a trustee, and his purchase consequently results in a breach of trust. *Langton v. Astrey*, 2 Ch. Rep. 80. Y

(3) **Shares in companies, purchase of.**

In the case of shares in companies, if the purchaser has no notice at the time of purchase, but has it before registration, still he is protected. *Dodds v. Hills*, 2 Hem. and Mil. 424. W

(4) **Improper loans of trust moneys**

— cannot be barred, so far as a beneficiary is concerned. *Ernest v. Crozdl*, 2 De. Gex F. and J. 198. X

(5) **Notice, actual and constructive.**

See notes on S 3, *supra*. Y

(6) **Notice after part-payment, effect of.**

(a) Part-payment of the purchase-money before notice is not sufficient to give a good title to purchaser. *Rayne v. Baker*, 1 Giff. 241. Z

(b) Nor is the giving of security for it. *Tourville v. Naish*, 3 P.W. 306. A

(c) The whole of the purchase-money must have been duly paid before notice of the trust. *Story v. Windson*, 2 Atk. 690. B

(7) **Complete conveyance to vendee necessary.**

For the plea of purchase without notice to be effectual, the property must, before any such notice reaches the purchaser, have been completely conveyed to him. *Wigg v. Wigg*, 1 Atk. 382; *Roots v. Williamson*, 38 C.D. 485. C

2.—“A transferee....transferee.”

(1) Vendee without notice from vendee with notice.

(a) GENERAL RULE.

- (i) The title of a purchaser for value without notice, from one with notice, is unimpeachable, and the beneficiary cannot follow the property in his hands. *Mertins v. Joliffe*, Amb. 313; *Fenars v. Cherry*, 2 Vern. 384 D
- (ii) The reason is that the *bona fides* of the second vendee is a good defence in itself, and the *mala fides* of the vendor ought not to invalidate it. (*Ibid.*) E

(b) EXCEPTION IN CHARITABLE TRUSTS.

This general rule is not applicable in the case of charitable trusts. For a purchaser without notice from a purchaser with notice shall be bound by the claim of charity. *Sutton Colefield Case*, Id. 68. F

(2) Vendee with notice from vendee without notice.

(a) TITLE GOOD—GENERAL RULE.

A purchase of trust-property with notice, from a vendee without notice, is valid and cannot be impugned. *Towther v. Carlton*, 2 Atk. 242; *Re Barrow's Case*, L.R. 14 Ch. D. 432. G

(b) REASON FOR THE VIEW.

The second vendee takes a good title, not from the merits of his purchase, but from the merits of the first purchaser. For, if an innocent purchaser were prevented from disposing of his property, it would result in a clog being placed upon the free circulation of property. *Harrison v. Forth*, Pr. Ch. 51. H

(c) EXCEPTIONS TO THE RULE.

- (i) Where the subject-matter of the purchase is an equitable estate, and is subject to the prior equitable interest. *Ford v. White*, 16 Beav. 120 I
- (ii) Where a person has sold property by fraud, and, alleging that he has given no notice, gets it back from him. *Kennedy v. Daly*, 18 Ch. and L. 379. J

(3) *Bona fide* Vendee from trustee—Subsequent purchase by trustee—Effect of.

Where the trustee sells the trust estate to a *bona fide* purchaser without notice, and afterwards himself becomes the owner of the lands, though for good and valuable consideration, the trust revives. *Booy v. Smith*, 2 Ch. Ca. 124, 1 Vern. 60. K

(4) Choses in action, purchase of, from trustee—Effect

(a) VENDEE CANNOT TAKE A BETTER TITLE THAN VENDOR.

As regards choses in action and other personal estate not transferable at law, which may have been purchased from a trustee, the purchaser, whatever amount he might have paid, cannot take better title than his vendor. *Ord v. White*, 3 Beav. 357. L

(b) SALE SUBJECT TO EQUITIES.

The vendee must (in conformity with the rules governing assignments of choses in action) hold them subject to the same equities as the trustee did. *Cockell v. Taylor*, 15 Beav. 103; *Clack v. Holland*, 19 Beav. 262. M

3.—“Nothing in S. 63....in circulation.”

See notes on §. 63, *supra*. N

4.—“*Or shall be....Contract Act (1872), S. 108.*”**Vendee taking a better title than vendor, when**

As to circumstances under which the buyer takes a better title than the seller, see the exceptions to S. 108, Indian Contract Act. O

5.—“*Or the liability....charge is transferred.*”**Transfer of debt or charge, if affected by S. 63**

S. 63 does not affect the liability of a person to whom a debt or charge is transferred. 2 A. 460. P

65. Where a trustee wrongfully sells or otherwise transfers trust-property, and afterwards himself becomes the owner of the property, the property again becomes subject to the trust notwithstanding any want of notice on the part of intervening transferees in good faith for consideration.

Acquisition by trustee of trust-property wrongfully converted ¹

(Notes).1.—“*Acquisition by trustee of trust-property wrongfully converted.*”**(1) Lands sold by trustee coming into his possession subsequently.**

See *Booy v. Smith*, 2 Ch. Cas. 124, under S. 64, *supra*. Q

(2) Defaulting trustee cannot claim as against beneficiary.

No beneficial interest in the trust-estate can be claimed by a defaulting trustee as against the beneficiary, even when the trustee derives title thereto as the next-of-kin of a deceased beneficiary or in other ways. *Jacobs v. Rylance*, L.R. 17 Eq. 341. R

66. Where the trustee wrongfully mingles the trust-property with his own, the beneficiary is entitled to a charge on the whole fund for the amount due to him.

Right in case of blended property ¹

(Notes).1.—“*Right in case of blended property.*”**(1) Basis of section.**

This section accords with *Cook v. Addison*, L.R. 7 Eq. 470. See Whit. Stokes, Vol. I, p. 829. S

(2) Mixing up of trust moneys with common fund—Breach of duty.

(a) It is a grave breach of duty in trustees to mix the incomes raised by them from trust properties, or moneys raised by taking out letters of administration, in one common fund with their own moneys. This grave breach of duty in trustees, in some circumstances, would expose them to very serious consequences, criminal as well as civil. 6 C. 70 (76) = 7 C.L.R. 19. T

1.—“*Right in case of blended property*”—(Continued).

- (b) “The trustee, wherever the trust-property may be placed, must always be careful not to amalgamate it with his own; for, if he do, the *cestus que trust* will be held entitled to every portion of the blended property, which the trustee cannot prove to be his own,” *Lupton v. White*, 15 Ves. 432. **U**
- (c) The principle on which the above is based is that, when a person promising to keep the property of another distinct mixes it with his own, the whole must be taken to be the property of the other, until the former puts the subject under such circumstances that it may be distinguished as satisfactorily as it might have been before that unauthorised mixture on his part. (*Ibid*) **Y**
- (d) In *Duke of Leeds v. Earl of Amherst*, Shadwell, V. C., says “The general wisdom of mankind has acquiesced in this, that the author of a mischief is not the party who is to complain of the result of it, but that he who has done it must submit to have the effect of it to recoil upon himself.” See Agnew, p 319. **W**

(3) **Trust-property mixed with other property so as to be not traceable.**

- (a) If the trust property has become so mixed up with the trustee's private property as to render it impossible to trace it, *e.g.*, where it has been converted into money, which has been put into circulation. (*Miller v. Race*, 1 Burr. 452), or has otherwise become indistinguishable, then (since the actual property is gone and that which stands in its place cannot be identified), the beneficiary can only proceed against the trustee personally for the breach. See Underhill, p. 383. **X**
- (b) Under the above circumstances, if the trustee happens to be a bankrupt, he can prove against his estate. *Ex parte Dumas*, 1 Atk. 232. **Y**
- (c) Where the trust money has been inseparably mixed up with the trustee's private money the beneficiary can claim a *lien* for the former upon the whole of the mixed funds *Lewis v. Madocks*, 17 Ves. 48; see *Re Purnfrey*, 22 Ch.D. 255, Lewin, p. 1126 **Z**

(4) **Trust property mixed with other property which can be traced**

- (a) Where, however, the mixed fund can be identified or traced out, *e.g.*, where the trustee has paid in the trust fund to his general banking account, the beneficiary can enforce his charge or lien upon the whole mixed fund. *Hallet*, 13 Ch. D. 696. **A**
- (b) Where a trustee paid trust money into his current account, and, out of money drawn upon that account, purchased an investment in his own name, and afterwards applied the balance for his purposes, held that his representatives have no right to maintain that out of the trustee's own money the investment was purchased, and that what he had subsequently spent was the trust money. *Re Oatway, Hertslet v. Oatway*, (1903) 2 Ch. 356. **B**

(5) **Trust funds employed by trustee in trade.**

On a trustee mixing trust funds with his own moneys, and employing the mixed fund in a trade or adventure of his own, the beneficiary may, if he prefers it, insist on charging the trustee with the principal and

1.—“Right in case of blended property ”—(Continued).

a proportionate share of the profits, instead of the principal and interest only. It is not in his province to claim both interest and profits concerning the money employed in trade. He must elect between them. *Vyse v. Porter*, L R. 8 Ch. 334; see, also, *Docker v. Somes*, 2 M. and K. 664. C

(6) Identification, necessity for.

On a trustee mixing the trust fund with his own moneys, prior to a charge or lien being substantiated, it must be shown that the trust fund in fact forms part of the fund or property whereon the lien is claimed.

“In order that the rule as to following trust money should apply, there must be something specific which is capable of being identified as that” into which the money has been converted, and where a transaction has been carried out by set-off in account, so that no cheque, note, coin, or credit has ever passed or existed in *specie*, the doctrine is inapplicable. *Re Hallett & Co.*, 2 Q B. (C.A.); *Ex parte Hurdcastle*, 29 W.R. 615. D

(7) Effect of trustee bound to invest a certain sum, purchasing at that amount.

(a) The mere fact of a trustee having trust money in his hands while making a purchase will not be enough for attaching the trust on lands bought by him. *Sealy v. Stawell*, 2 Ir. R. Eq. E

(b) But, where a trustee, bound to lay out money on land, purchases an estate for a sum corresponding with the amount to be invested, the Court may presume the trust money to have been so applied. *Price v. Blackmore*, 6 Beav. 507. F

(c) But if it can be shown that the trustee, who is bound to lay out money on land, was mistaken in the nature of his trust, and acted under a different notion, no such presumption can arise. *Perry v. Philips*, 4 Ves. 108. G

(8) Beneficiary, if can take land itself or has only lien.

(a) “Where a trust fund is traceable into land, and the fund constitutes a part only of the money laid out in the purchase, the Court has usually given a lien merely on the land for the trust money and interest.” *Lane v. Dighton*, Amb. 409; see Lewin, 11th Ed., p. 1130. H

(b) “But where the entire land is clearly the fruit of the trust fund, the beneficiary must, on principle, have a right to take the land itself, whether the purchase was or was not of the description authorised by the trust.” *Trench v. Harrison*, 17 Sim. 111. I

(9) Right of trustee concurring in breach to follow trust funds.

Where a trustee himself concurs in a breach of trust, he is at liberty, in spite of such concurrence, to institute proceedings against his co-trustee, to follow the trust funds. *Carson v. Sloane*, 13 L.R. Ir. 139. J

(10) Money followed through bank

(a) “If a trustee pay trust-money into a bank to the account of himself, not in any way ear-marked with the trust, and also keep private money of his own to the same account, the Court will disentangle the account, and separate the trust from the private money, and award the former specifically to the *cestui que trust*. *Pennell v. Detell*, 4 De. G. M. and G. 372. K & L

1.—“Right in case of blended property”—(Concluded).

- (b) In the case of a person occupying a fiduciary position, although not an express trustee, as a factor or agent, the same rule is equally applicable. *Re Hallet's Estate*, 13 Ch. D. (C.A.) 696. **M**
- (c) The same rule has been applied to the case of a person, who borrows money for a specific purpose and does not apply it for the purpose for which it was advanced. *Gibert v. Gonard*, 52 L.T.N.S. 54. **N**
- (d) In a case in which the question is only between the *cestui que trust* and the trustee, as long as the trustee has money of his own standing to his account, the trustee's drawings for his purpose will be attributed to his private money, leaving the trust money intact. *Re Hallet's Estate*, 13 Ch. D. (C.A.) 696. **O**
- (e) On a trustee exhausting his own money, the sums drawn out, in the absence of evidence to the contrary, will be attributed to the earliest deposits. (*Ibid.*) **P**

(11) Banker and agents—Moneys of constituents ordered to be invested, mixed with their own, before insolvency.

Where the insolvents, carrying on business as bankers and commission agents, invested a portion only of the moneys of one of their constituents in securities, and satisfactorily explained their not having invested the remainder also as required by the constituent, it was held that they held the money as bankers and not as agents, and that they were, in consequence, justified in not having kept the money separate from their own funds. 6 C. 70=7 C.L.R. 19. **Q**

(12) Trust funds intermixed and dealt with as common fund—Apportionment of profits.

When two or more trust funds are intermixed and dealt with as a common fund, the profits are apportioned between the beneficiaries, in the proportions to which they were originally entitled to the common fund. See *Provost of Edinburgh v. Lord Advocate*, 4 App. Cas. 823.R

(13) Bailor and bailee—Effect of mixture without bailor's consent when goods cannot be separated.

Indian Law —If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from other goods, the bailor is entitled only to compensation.

English Law :—But according to English Law the bailor takes the whole of the goods. See Agnew, p. 319. **S T**

(14) Commission agent mixing his goods with those of principal.

On a Commission agent mixing his goods with those of his principal, and destroying his books of account, the Court disallowed him his commission. *Gray v. Harg*, 20 Beav. 219. **U**

(15) Beneficiary seeking to enforce lien, *onus* on.

In cases where the beneficiary claims a charge over specific fund or property, in order to enable him to exercise his lien, the *onus* is upon him to show that the specific fund includes the trust fund in it. *Hardcastle*, 29 W.R. 615. **Y**

67. If a partner, being a trustee, wrongfully employs trust-property in the business, or on the account, of the partnership, no other partner is liable therefor in his personal capacity to the beneficiaries, unless he had notice of the breach of trust.

Wrongful employment by partner-trustee of trust property for partnership purposes ¹.

The partners having such notice are jointly and severally liable for the breach of trust.

Illustrations.

2 (a) A and B are partners. A dies, having bequeathed all his property to B in trust for Z, and appointed B his sole executor. B, instead of winding up the affairs of the partnership, retains all the assets in the business. Z may compel him, as partner, to account for so much of the profits as are derived from A's share of the capital. B is also answerable to Z for the improper employment of A's assets.

3 (b) A, a trader, bequeaths his property to B in trust for C, appoints B his sole executor, and dies. B enters into partnership with X and Y in the same trade, and employs A's assets in the partnership-business. B gives an indemnity to X and Y against the claims of C. Here X and Y are jointly liable with B to C as having knowingly become parties to the breach of trust committed by B.

(Notes).

1.—“Wrongful employment. . . partnership purposes.”

(1) Principle of the section.

This section declares that, if a partner, being a trustee, wrongfully employs trust-property in the business, his co-partners are personally liable if they have notice of the breach of trust, but not otherwise. *Whit. Stokes*, Vol. 1, p. 829. **W**

(2) Partners when liable for such wrongful employment.

(a) Partners, knowingly permitting one of their co-partners happening to be a trustee to employ trust funds in the partnership business, even if they be not responsible as partners, can be held liable for having been parties to the breach of trust. *Flockton v. Bunning*, L.R. 8 Ch. 323 (n); see also, *Vyse v. Forstie*, 7 H.L.C. 318. **X**

(b) Partners having notice of such breach of trust will be held liable for the money as constructive trustees, though they do not constitute active trustees so as to be prohibited from profiting by their trust. *Stroud v. Guyer*, 28 Beav. 180. **Y**

(3) Right of beneficiary to follow trust money into the hands of a firm.

(a) Owing to the mere fact that trust funds have been employed in a partnership concern, the firm cannot be made liable. *Ex parte Apsey*, 3 Bro. C.C. 265. **Z**

(b) For making the firm liable, all the partners must have been implicated in the breach of trust. *Lindley*, 4th Ed., p. 312. **A**

(c) There would be manifest injustice if persons are made liable for a breach of trust of which they are wholly ignorant. (*Ibid.*) **B**

1.—“Wrongful employment... partnership purposes” —(Concluded). •

(d) If an imputation against the partners that they knew, or ought to have known, that trust moneys were being employed in a partnership concern, can be made, such partners will be held bound to see that the trust to which the money is subject authorises the use of it, and will have to answer for a breach of trust in case of its misapplication or loss. *Lindley*, 4th Ed., p. 312. **C**

(e) The beneficiary's right to follow the trust money is an incident of his ownership, and the fact that the money has to be traced not to a single individual but to the hands of a firm cannot make any difference. See *Lindley*, II, 1—4. **D**

(1) Deceased partner's funds used in trade by surviving partner as his executors.

“If a surviving partner, being the executor of a deceased partner, continue the testator's capital, without authority, in his trade, — the Court will follow the trust capital throughout all its ramifications, and give to the beneficiaries of the deceased partner's estate the fruits derived from that capital, whatever change and fluctuations it might have undergone.” See *Lewin*, 11th Ed., p. 1126. **E**

~(5) Trustee trading with deceased partner's money.

As regards the liability of a trustee or executor employing funds of his deceased partner in a partnership concern, see *Craieshay v. Collins*, J. and W. 267, 279, *Willett v. Blanford*, 1 Hare 253. **F**

2.—“III. (a).”

Partnership determined—Partner retaining assets instead of winding up—Effect.

When a partnership is determined by efflux of time or bankruptcy or death, and a partner, instead of winding up the partnership affairs, retains all the assets in the concern, such partner must not only account for the share of the profit, but also for the improper employment of capital. *Whillet v. Blanford*, 1 Hare 235. **G**

N.B.—The above is the principle recognised in this illustration •

3.—“III. (b).”

This illustration is based on *Pickton v. Bunning*, 8 L R Ch. App. 323 (n), noted *supra*. **H**

Liability of beneficiary joining in breach of trust. 1

68. Where one of several beneficiaries—

(a) joins in committing breach of trust, or

(b) knowingly obtains any advantage therefrom, without the consent of the other beneficiaries, or

(c) becomes aware of a breach of trust committed or intended to be committed, and either actually conceals it, or does not, within a reasonable time, take proper steps to protect the interests of the other beneficiaries, or

(d) has deceived the trustee, and thereby induced him to commit a breach of trust,

the other beneficiaries are entitled to have all his beneficial interest impounded as against him, and all who claim under him (otherwise than as transferees for consideration without notice of the breach), until the loss caused by the breach has been compensated.

When property has been transferred or bequeathed for the benefit of a married woman², so that she shall not have power to deprive herself of her beneficial interest, nothing in this section applies to such property during her marriage.

(Notes).

1.—“Liability of beneficiary joining in a breach of trust.”

(1) One of several beneficiaries joining in a breach of trust.

(a) Where one of several beneficiaries joins with a trustee in committing a breach of trust, and the trust, estate is put to loss, the other beneficiaries have a right to have the whole of the interest in the trust-property stopped and accumulated in the hands of the trustees, until the amount impounded with the accumulations thereon has compensated for the loss for which that beneficiary is responsible. *Re Ex parte King*, 2 M. and A. 410. See Agnew, p. 322. I

(b) A beneficiary concerned in the breach of trust should not be allowed to receive any part of the benefits to which he may be entitled, until and unless he has made good the breach of trust. *Woodjatt v. Gresley*, 8 S.M. 180 J

(2) Rule adopted by Court in such cases.

“Nothing can be more clear than the rule which is adopted by the Court in these cases, that, if one party having a partial interest in the trust fund induces the trustee to depart from the direction of the trust for his own benefit, and enjoys that benefit, he shall not be permitted personally to enjoy the benefit of the trust, whilst the trustees are subjected to a serious liability which he has brought on them. What the Court does in such a case is, to lay hold of the partial interest to which that person is entitled, and apply it, so far as it will extend, in exoneration of the trustees, who, by his request and desire, acquiescence or by any other mode of concurrence, have been induced to do the improper act.” *Lincoln v. Wright*, 4 Beav. 432, *Jacobus v. Rylandes*, L.R. 17 Eq. 341. K

(3) Any equitable interest of beneficiary impoundable.

For the purpose of being impounded, it is not necessary that the equitable interest of the co-beneficiary must be an original interest; it is sufficient if the interest be a derivative one. *Chilworth v. Chambers*, 1 Ch. 685. L

1.—“Liability of beneficiary joining in a breach of trust”—(Continued).**(4) Breach of trust—Estate legally vested in wrong-doer, also available**

(a) To repair the breach of trust, even an estate legally vested in the wrong-doer by the settlor—an instrument *inter vivos*—may, owing to an implied contract, be made available *Woodyatt v. Gresley*, 8 Sim. 180. **M**

(b) But to a legal devisee the doctrine cannot be extended. *Egbert v. Butler*, 21 Beav. 560 **N**

(5) Legal estate of beneficiary, not impoundable *

The equitable interest of the beneficiary can alone be impounded, and not his legal estate. *Fox v. Buckby*, 3 Ch. D. 503. **O**

(6) Right of trustee to recover from beneficiary for life on behalf of beneficiary in remainder

Trustees are entitled to stand in the place of the *cestui que trustent* in remainder, for the purpose of recovering, against the *cestui que trustent* for life, who instigated a breach of trust, or their estates, the benefit actually received by them in consequence of such breach of trust *Raby v. Rudehalgh*, 7 D.M.G. 109 **P**

(7) Beneficiary in default under covenant in trust—Instrument

(a) On a beneficiary being in default under a covenant in the trust instrument for payment of money, the trustee has the right to retain the trust property till the default is made good. *Re Weston*, (1900) 2 Ch. 164 **Q**

(b) *Semble*—This right exists in favour of trustees of a voluntary settlement, provided the same is enforceable by the Court (*Ibid*) **R**

(8) Co-trustee being also a beneficiary.

(a) When a trustee, a party to a breach of trust, is also a beneficiary, his entire beneficial interest, acquired before or after the breach, must be applied in making good the loss. See *Lewis*, 11th Ed., p. 1154 **S**

(b) But in *Burks v. Michlethwait*, 33 Beav. 109, the co-trustee's lien seems to have been limited to the amount of the contribution **T**

(9) Impounding of interest of beneficiaries indebted to trust estate. *

In England, the right to impound has not been restricted to the case of the beneficiary joining the breach of trust, but has been extended also to cases of beneficiaries being debtors to the trust estate. *Davies v. Jayward*, 2 Ch. 164, see *Akerman*, 3 Ch. 43. **U**

(10) Lien to impound beneficiary's interest, priority of.

The lien on a beneficiary's interest, for the purpose of its being impounded by the other beneficiaries, is superior to the right of any mortgagee from such beneficiary. *Bolton v. Currie*, 1 Ch. 544, *Lewin*, p. 1155. **Y**

(11) Interest of beneficiary against whom to be applied.

(a) The interest of a beneficiary concurring in a breach of trust will be applied to make good the loss to the trust-fund, as against his assignee in insolvency. *Ex parte Turpin*, 1 D. and C. 120. **W**

(b) Judgment-creditors. See *Kilworth v. Mountcashell*, 15 L.R.Ch.Rep. 565. **X**

(c) Or general creditors, *Walliams v. Allen*, 32 Beav. 650. **Y**

(d) And as against any individual claiming under him (save in the case of purchasers for value without notice of the breach of trust). *Woodyatt v. Gresley*, 8 Sim. 180. **Z**

1.—“Liability of beneficiary joining in a breach of trust”—(Concluded).

(e) The rule under consideration is also applicable to a married woman entitled to her separate use, since a married woman acting with respect to her separate property is competent to act, in all respects, as if she were not married. *Hulme v. Fennant*, 1 Bro. C. C. 20. **A**

(f) But such a rule is not applicable, where the property is settled on a married woman for her separate use without power of anticipation. *Grigby v. Cor*, 1 Ves. 518. **B**

(12) Right to impound, as against beneficiary's transferees.

The right of beneficiaries to impound their co-beneficiary's interest extends not only against him as such, but also against his *bona fide* transferees for value without notice. *Jacobs v. Ryplance*, 17 Eq. 351, see *Edgar v. Plomby*, A.C. 431 (1900). **C**

(13) Beneficiary's concurrence in breach of trust.

(v) A beneficiary concurring in a breach of trust is for ever estopped from proceeding against the trustee for the consequences of the act. *Bruce v. Stokes*, 11 Ves. 319. **D**

(b) Therefore, a beneficiary who is also a trustee has no right to hold his co-trustee responsible for any act in which they both joined. *Butler v. Carter*, 5 L.R.Eq. 281. **E**

(14) Concurrence in breach of trust, essentials for.

In order that a person might be held to have concurred in a breach of trust, it must be shown that he was aware of the facts and had the means of knowing that a breach of trust was involved in the acts assented to by him. *Bucherdge v. Glasse*, 1 Cr. and Ph. 126, Lewin, p. 1172. **F**

(15) Acquiescence of beneficiary.

—in a breach of trust may debar him from relief. *Harden v. Parsons*, Eden 145. **G**

(16) Gross laches.

• (a) —, e.g., for 20 years, will disentitle the beneficiary to relief. *Bright v. Legerton* (No. 1), 29 Beav. 60. **H**

(b) But, mere knowledge of a right to sue for a breach of trust, without suing for a few years, cannot destroy the right to impeach the transaction. (*Ibid.*) **I**

2.— ‘Married woman.’

(1) Females covert and infants.

(a) — cannot concur in a breach of trust, they having no legal capacity to consent to the transaction. *Rydes v. Bickerton*, cited in *Walker v. Symonds* 3 Sw. 80, *Wilkinson v. Parry*, 4 Russ. 276. **J**

(b) But neither coverture nor infancy is a protection, if they are guilty of actual fraud. Lewin, p. 1168. **K**

(2) Beneficial interest of married woman.

In England, the beneficial interest can be impounded even in the case of a married woman restrained from anticipation. *Halt*, 2 Ch. 525. **L**

(3) Married women subject to the Indian Succession Act.

• —are at liberty to deal with their property, as if unmarried. (See S. 4, Act X of 1865). **M**

Rights and liabilities of beneficiary's transferee. 1

69. Every person to whom a beneficiary transfers his interest has the rights, and is subject to the liabilities, of the beneficiary in respect of such interest at the date of the transfer.

(Notes).

(N.B.—See, also, notes to S. 58, *supra*.)

1.—“Rights and liabilities of beneficiary's transferee”

(1) Beneficiary's right to transfer.

According to S. 58, *supra*, a beneficiary may transfer his interest in the trust fund. N

(2) Equities affecting beneficiary enforceable against his assignee.

(a) According to this section, an assignee is bound by the equities affecting his assignor, and could therefore take only subject to such equities. *Ford v. White*, 16 Beav. 120. O

(b) A person who takes an equitable mortgage, with notice of a prior equitable mortgage, is not at liberty, by assignment to another without notice, to give him a better title than he has himself. (*Ibid.*) P

(3) Obtaining transfer of equitable interest fraudulently

A mortgages or sells an equitable interest to B, which mortgage or sale is fraudulently obtained, and then B transfers to C. Here C, though he has notice of the fraud or not, takes subject to A's equity to have the mortgage or sale set aside. *Cockell v. Taylor*, 15 Beav. 103. Q

(4) Beneficiary debtor to trust estate.

(a) The assignee from a beneficiary in debts to the trust-estate can get the right to the beneficial interests assigned to him, only on his discharging the debts due by his assignor. *Priddy v. Rose*, 3 Mer. 86. R

(b) Such an equity attaches on an assignee from a beneficiary, whose interest is liable to be impounded, by reason of his complicity in a breach of trust. *Bolton v. Currie* (1895), 1 Ch. 544. S

(5) Trustee debtor to trust estate

(a) A similar equity attaches on an assignee from a trustee or executor having a beneficial interest, but is a debtor to the trust or executorship. *Clack v. Holland*, 19 Beav. 262. T

(b) On a trustee, having a beneficial interest in the trust-estate and owing money to it, assigning his interest, the assignee is under obligation to discharge the debt owing to the trust-estate by the trustee. This is the case, whether the original debt was contracted before or after assignment. *Morris v. Lure*, 1 Y. and C.C.C. 380. U

(6) Assignor not acquiring fiduciary position until after assignment.

Where an assignor does not acquire his fiduciary position until after the assignment, no equity will arise against him in respect of a subsequently incurred debt. *Irbly v. Irbly*, 30 Beav. 632. V

(7) Set-off affecting assignee.

An assignee from a beneficiary is liable to the same equities as his assignor, not merely in respect of the actual payments, but in regard to the right of set-off. *Cavandish v. Greaves*, 24 Beav. 163 (173). W

CHAPTER VII.

OF VACATING THE OFFICE OF TRUSTEE

Office how vacated. **70.** The office of a trustee is vacated by his death or by his discharge ¹ from his office.

(Notes)

1.—“*Discharge.*”See notes under S. 71, *infra*.**X**

Discharge of trustee.

71. A trustee may be discharged from his office only as follows:—

- (a) by the extinction of the trust ¹;
- (b) by the completion of his duties under the trust ¹;
- (c) by such means as may be prescribed by the instrument of trust ;
- (d) by appointment under this Act of a new trustee in his place ³;
- (e) by consent of himself and the beneficiary, or, where there are more beneficiaries than one, all the beneficiaries being competent to contract ⁴, or
- (f) by the Court to which a petition for his discharge is presented under this Act. ⁵

(Notes).

1.—“*Clauses (a) and (b).*”See notes to S. 77, *infra*.**X1****2.**—“*Clause (c).*”**(1) Reason for this provision.**

Since a person creating a trust may mould it in any way he pleases, he may provide that, on the occurrence of certain events, and the fulfilment of certain conditions, the original trustee may retire, and a new trustee be substituted. See Agnew, p. 327

Y**(2) Form of power most commonly in use in instruments drawn according to English precedents**

- (a) “In case the trustees appointed by the instrument of trust, or to be appointed under the power, or any of them, shall die or be abroad for twelve calendar months, or be *desirous of being discharged from*, or refuse, decline, or become incapable (unfit), to act in, the trusts it shall be lawful for the *cestui que trust*, to whom the power may be given, or (as the proviso is frequently worded) for the surviving or continuing trustee, or the executors or administrators of the survivor, by deed or writing, to nominate some other person to be a trustee.” Lewin, 11th Ed., pp. 786, 787.

Z

2.—“*Clause (c)*”—(Concluded).

(b) “The best forms provide that a refusing or retiring trustee shall, if willing to exercise the power, be deemed to be a continuing trustee.” Agnew, p. 327. **A**

(c) “But it is attended with this inconvenience, that, if the refusing or retiring trustee do not join, evidence may be called for that he was *not willing*.” Lewin, 11th Ed., p. 786. **B**

(d) “Sometimes the power is given to the surviving, continuing, or other trustee — an addition which has been found useful in practice.” See *Lord Camoys v. Best*, 19 Beav. 414, Agnew, p. 327. **C**

(e) The power then proceeds to declare that the trust estate shall forthwith be vested jointly in the persons who are in future to compose the body of trustees, and that the new or substituted trustee shall, either before or after the trust estate shall have been so vested, be capable of exercising all the same powers as if he had been originally named in the settlement.” Lewin, 11th Ed., p. 787. **D**

(3) **Trustees to see that circumstances urging him to retire are precisely those contemplated by the proviso**

A trustee must carefully ascertain that the circumstances under which he retires from the trust are precisely those contemplated in the terms of the proviso. For if it is otherwise, the trustee resigning will be made liable for all the evil consequences just as if he had delegated the office. See Lewin, p. 796. **E**

(4) **Beneficiary's power to remove and appoint trustee, to be exercised reasonably.**

An instrument creating a trust may confer on its beneficiaries the power to remove a trustee appointed under it and appoint a new one in his place, but the power must be exercised reasonably, and the Court will not uphold the removal, unless it is satisfied that the power was exercised for the benefit of the trust, and not in a capricious manner. 9 Bom. L.R. 514 (121), [*Upper v. Turkey*, (1844), 2 Jc. and Lat. 95, R.] **F**

(5) **Difficulties justifying retirement must arise in connection with administration of trust**

The unexpected difficulties justifying the retirement of a trustee must, nevertheless, arise in connection with the administration of trusts, and not relate to himself individually, or to any act of his own. *Forshaw v. Harginson*, 20 Beav. 485. **G**

(6) **Retirement justified.**

The doubt as to whether the trusts have been declared according to the intent of the parties justifies the retirement. *Neale v. Davies*, 5 D. M. and G. 258. **H**

3.—“*By appointment . . . of a new trustee in his place.*”

(N.B.—See also notes under Ss. 73, 74, 75, *infra*)

(1) **Misbehaviour of trustee**

A trustee who has misbehaved can, at the request of the beneficiaries, be removed from office, by the Court appointing a new trustee in his place. *Millard v. Eyre*, 2 Ves. 91; see *Palanet v. Camer*, 32 Beav. 564. **I**

3.—“By appointment....of a new trustee in his place”—(Concluded).

(2) Bankrupt trustee.

(a) A trustee becoming a bankrupt is liable to be removed from office, and the fact that he has obtained the order of discharge cannot make any difference. *Burke*, 45 L J Ch 52 J

(b) If a trustee becoming a bankrupt refuses to join in the appointment of a new trustee, the Court should at the request of the beneficiaries, remove him and appoint a new one. *Re Adams*, 12 Ch. D. 634. K

(3) Costs of appointment of new trustee, prior to Trustee Act, 1893.

Previous to the conferring on trustees of the statutory powers under the Trustee Act, 1893, where the circumstances preventing the continuance of the trustee's duties arose from any act of his own, or anything relating to himself, he had to pay the costs of the appointment of a new trustee. *Forslum v. Hugginson*, 20 Beav. 485. L

4. “By consent contract.”

Discharge by beneficiaries.

(1) Beneficiaries to be *sui juris*.

(a) A trustee can only be effectually discharged by the common consent of all beneficiaries, if they are all competent to contract. *Wilkinson v. Parry*, 4 Russ 276 M

(b) They should not be infants, for, if any of them are infants, no discharge by those who are *sui juris* will prevent the trustee from his liability to the infant beneficiaries. *Wilkinson v. Parry*, 4 Russ. 276. N

(c) “The rule will be the same, whatever the disability may be” See Agnew, p. 327. O

(2) Concurrence of majority of beneficiaries insufficient for discharge of trustee.

(a) All the beneficiaries must concur in the discharge, a discharge by the majority being ineffectual. *Ex parte Hughes*, 6 Ves. 622. P

(b) For, even in the case of a numerous body of creditors, the consent of the majority is no estoppel as against the rest. (*Ibid.*) Q

(3) Forcible removal.

A trustee cannot be forcibly removed by a beneficiary or a trustee. *Ex parte Hughes*, 6 Ves. 617 R

(4) Beneficiary not in existence.

Where all or any of the beneficiaries are unborn the trustee cannot, with safety, be discharged under the clause, as he cannot have the sanction of all the parties interested. See Godefroi, 3rd Ed., p. 705. S

(5) Trustee obtaining sanction of all beneficiaries, *sui juris*—Effect.

A trustee obtaining the joint sanction of all the beneficiaries, who are of full age and *sui juris*, cannot afterwards be made responsible on the ground of delegation of his office. See Godefroi, p. 705. T

5.—“By Court....Act.”

(N.B.—See notes to S. 72, *infra*).

(1) Discharge of trustee by order of Court.

A trustee can retire on the order of Court to that effect. *Re Gregson*, 34 Ch. D. 209. **U**

(2) Issue of originating summons for appointment of new trustee.

A trustee wishing to retire, by appointing a new trustee in his place, may get an originating summons under the rules of the supreme Court for the appointment of such a trustee. *Re Somerset*, W.N. (1887), 122. **Y**

(3) Payment of costs of retiring trustee.

(a) A trustee wishing to retire from office must be paid his costs from the estate. *Stokes*, 13 Eq. 383. **W**

(b) A trustee retiring on proper grounds and out of necessity will be entitled to get his costs from the trust-estate. *Greenwood v. Wakeford*, 1 Beav. 576; *Gardiner v. Downes*, 22 Beav. 395. **X**

72. Notwithstanding the provisions of section 11, every trustee may apply by petition to a principal Civil Court of original jurisdiction to be discharged from his office¹; and, if the Court finds that there is sufficient reason for such discharge², it may discharge him accordingly, and direct his costs to be paid out of the trust-property³. But, where there is no such reason, the Court shall not discharge him, unless a proper person can be found to take his place⁴.

Petition to be discharged from trust.

(Notes).

1.—“Every trustee may apply....to be discharged from his office.”

(1) Duties becoming complicated—Discharge.

Where the duties of the trust have become more complicated than they originally were, the trustee may insist on being discharged and may enforce that right by action. *Greenwood v. Wakeford*, 1 Beav. 576. **Y**

(2) Trustee getting himself discharged on application to Court.

(a) By submitting the management of the trust to the Court, the trustee may in a proper case get himself relieved of the liabilities of his office. *Forshaw v. Haggison*, 20 Beav. 485. **Z**

(b) In such an action, the Court, in a proper case, exercises its jurisdiction for discharging a trustee, without appointing a new trustee in his place. *Re Cherdwynn's Settlement*, (1902) 1 Ch. 692. **A**

(3) No new trustee can be found—Trustee's right to be discharged.

(a) In cases where no other fit person can be found willing to act, the right of the trustee to be discharged must depend on the circumstances of the case. *Lewin*, p. 814. **B**

(b) It is not possible for the Court to divest the trustee of the estate, before some one can be found to take it. See *Foreshaw v. Haggison*, 20 Beav. 485. **C**

4.—“Every trustee may apply.... to be discharged from his office”—(Cid).

(4) Discharge of executor, when can be made.

“An executor is regarded in some sense as a trustee, but he cannot, like a trustee, be discharged, even by the Court, from his executorship; when the funeral and testamentary expenses and legacies have been satisfied, and the surplus has been invested upon the trusts of the will, the executor then drops that character and becomes a trustee in the proper sense, and may then be discharged from the office, like any other trustee.” Lewin, 11th Ed., pp. 816, 817. D

(5) Effect of discharge of executor.

Where he has made out a proper case for his discharge, the Court could discharge an executor on his own application. Such a discharge however would not affect his liability for his past acts and omissions as executor—it would only relieve him from the duties of the office subsequent to the discharge. 29 B. 188=7 Bom. L.R. 195. E

2.—“Sufficient reason for such discharge.”

(1) Trustee cannot capriciously retire.

A trustee accepting a trust will not be allowed, voluntarily, from mere caprice or other trivial cause, to throw it up at the expense of his beneficiary. The Court ought to come to a conclusion in each case, whether the conduct of the trustee in the particular instance falls within the rule. *Courtenay v. Courtenay*, 3 J. and Lat. 533. F

(2) Willful misbehaviour on the part of the trustee.

—will amount to sufficient reason for his discharge. *Palairé v. Carew*, 32 Beav. 564. G

3.—“Direct his costs to be paid out of the trust property.”

(1) Costs of trustee retiring on proper grounds.

See under S. 71, *supra*. H

(2) Costs of trustee's representatives refusing to act.

An executor of a trustee or any other of his representatives may refuse to act in the trusts and claim his costs. *Legg v. Macknoll*, 1 Giff. 165; *Aldridge v. Westbrooke*, 4 Beav. 212. I

(3) Complication of trust.

On a trust, originally a simple one, becoming embarrassing from its complication, the trustee may apply to be relieved, and will be given his costs. *Barker v. Peile*, 2 Drew 340. J

(4) Costs to be borne by trustee retiring capriciously.

Where a trustee retires capriciously and without proper reasons, he will have to bear the costs of the retirement. *Howard v. Rhodes*, 1 Keen 531. K

4.—“But where....place.”

Trustee desiring to retire from mere caprice.

On a —, it is doubtful whether the Court can or will discharge him, unless another person is found as substitute. *Ardill v. Savage*, 1 Ir. Eq. Rep. 79. L

(General).

(1) **Trustee entitled to discharge not bound to nominate substitute.**

Where the trustee is not retiring voluntarily and from mere caprice, but is entitled to be discharged from his trust, he is not bound to show to the Court that there is some other person ready to accept the trust. *Courtenay v. Courtenay*, 3 J. and Lat. 539. **M**

(2) **Part of trust estate lost.**

On a part of the original trust estate being supposed to be lost, or not forthcoming, the Court will not appoint new trustees, so as to make them partial trustees only, but will appoint them trustees generally. The Court, if required, will, at the same time, to protect the trustees, direct an enquiry, when any portion of the trust fund has been lost, and what steps should be taken for its recovery. *Bennett v. Burgess*, 5 Hare 295. **N**

(3) **Application for discharge—Procedure—English and Indian law.**

(a) According to the law prevalent in England, an application by the trustee, to the Court, to be discharged from the trust, must be by suit or bill. *Ex parte Anderson*, 5 Ves. 248. **O**

(b) If, however, a suit *re* the trust estate is pending, the trustee may move in the suit itself for his discharge; he may solicit dismissal by petition or motion. —*v. Osborne*, 6 Ves. 455. **P**

(c) According to Indian law, he can apply by petition (*Vide* section). **Q**

(4) **Service on opponents to application beyond jurisdiction.**

Service may be ordered by the Court, on opponents to an application for discharge, out of the Court's jurisdiction, or, substituted service may be effected. *In re Bevel's Telegraph Co.*, 43 L.J. Ch. 720. **R, S**

73. Whenever any person appointed a trustee disclaims ¹, or any trustee, either original or substituted, dies ², Appointment of new trustees on or is, for a continuous period of six months, death, etc. absent from British India ³, or leaves British India for the purpose of residing abroad ⁴, or is declared an insolvent ⁵, or desires to be discharged from the trust ⁶, or refuses or becomes, in the opinion of a principal Civil Court of original jurisdiction, unfit or personally incapable to act in the trust ⁷, or accepts an inconsistent trust, a new trustee may be appointed in his place by—

(a) The person nominated for that purpose by the instrument of trust (if any) ⁸, or

(b) if there be no such person, or no such person able and willing to act, the author of the trust, if he be alive and competent to contract, or the surviving or continuing trustees or trustee for the time being, or legal representative of the last surviving and

continuing trustee, or (with the consent of the Court) the retiring trustees, if they all retire simultaneously, or (with the like consent) the last retiring trustee ⁹.

Every such appointment shall be by writing under the hand of the person making it.

On an appointment of a new trustee, the number of trustees may be increased ¹⁰.

The Official Trustee may, with his consent, and by the order of the Court, be appointed under this section, in any case in which only one trustee is to be appointed, and such trustee is to be the sole trustee.

The provisions of this section relative to a trustee who is dead include the case of a person nominated trustee in a will, but dying before the testator ¹¹, and those relative to a continuing trustee include a refusing or retiring trustee if willing to act in the execution of the power.

(Notes.)

(N.B.—See notes on S. 60, *supra*).

(General).

Provisions of the section—source of.

The provisions of the section have been taken from the Trustee Act, 1893, which, after providing for the appointment of new trustees, enacts certain rules also for the vesting of the trust property in the trustees newly appointed. See S. 10 of Trustee Act, 1893. T

1.—“Whenever any....disclaims.”

(1) Disclaimer by a trustee—Effect of, etc.

See notes on S. 44, *supra*. U

(2) Disclaimer of trusts amounts to retirement—Appointment of new trustee justifiable.

(a) A disclaimer of trusts, even after the trustee has acted in them, is regarded as a desire to retire, and an appointment of new trustees would be justifiable. *Noble v. Maymolt*, 14 Beav. 471. Y

(b) A disclaiming trustee comes within the meaning of a retiring trustee. *Viscountess D'Adhemar v. Bertrand*, 35 Beav. 19. W

2.—“Or any trustee...dies.”

(1) Death of one of the trustees, effect of, on the administration of trust estate.

See notes on S. 44, *supra*. X

(2) Death of a trustee—Appointment of another in his place.

A trustee can be appointed in the place of one dying in the testator's life-time, by the surviving or continuing trustees, either under a power in the settlement, or under the statutory power. *Re Hadleys' Trusts*, 5 De. G. and Sm. 67. Y

3.—“*Or is for a continuous.....British India.*”

(1) Absence from the United Kingdom—English law.

(a) ABSENCE FOR MORE THAN TWELVE MONTHS.

Where a trustee is out of the United Kingdom for more than twelve months, a new trustee could be appointed. S. 10 of Trustee Act, 1893. **Z**

(b) CONCURRENCE OF SUCH TRUSTEE IF NECESSARY FOR NEW APPOINTMENT.

It is unnecessary to get the consent of such trustee, who is abroad, for the appointment of a new trustee, unless he is willing and competent to concur. *Re Coates to Parsons*, 34 Ch. D. 370. **A**

(c) WILLINGNESS AND COMPETENCY OF TRUSTEE OUT OF THE UNITED KINGDOM—ONUS OF PROOF.

The *onus* of proving that he was willing and competent is upon the person impugning the validity of the appointment. (*Ibid.*) **B**

(2) Temporary absence—if sufficient for appointing a new trustee.

A mere temporary absence, with the intention of returning, cannot justify the appointment of a new trustee. *Re Moranan Society*, 26 Beav. 101. **C**

4.—“*Or leaves British India.....abroad.*”

(1) Trustee residing abroad.

(a). Where a trustee has left the country to reside permanently abroad, and his whereabouts are not known, a new trustee may be appointed. *Re Bignolds' Settlement Trusts*, 7 L.R. Ch. App. 223; *Re Harrison's Trusts*, 22 L.J. Ch. 69. **D**

(b) Where a trustee goes away abroad, for a very long period, or, resides there permanently, the Court may remove him at the instance of the beneficiary. *Buchanan v. Hamilton*, 5 Ves. 722. **E**

(c) Where a trustee had taken a *five years' lease of a house in a foreign country*, for the purpose of residence, there was held to have been sufficient ground for his removal from office. *Payne v. Slangford*, 1 Ch. 288. **F**

5.—“*Or is declared an insolvent.*”

Recent bankruptcy necessary for removal.

In order that the insolvency of a trustee may justify his removal from office, it is necessary that he must have been *recently declared a bankrupt*. *Adam's Trust*, 12 Ch. D. 634; *Banker*, 1 Ch. D. 43. **G**

6.—“*Or desires to be discharged from the trust.*”

Retirement of trustee in consideration of premium.

(a) In consideration of premium paid to him for so doing, a trustee cannot retire from office, and an appointment, made by the retiring trustee, of the person who so paid the premium, is invalid. *Sugdeve v. Crossland*, 8 Sm. and G. 192. **H**

(b) Nor could he retire in favour of one, who intends to commit a breach of trust. If he so retires, he is responsible for the misbehaviour of the trustee who is newly substituted in his place. *Palairret v. Carew*, 32 Beav. 564; *Head v. Gould*, (1898) 2 Ch. 250 at 273, 274. **I.**

7.—“Or refuses or becomes.....incapable to act in the trust.”

(1) Incapacity, a ground for appointing a new trustee.

- (a) Personal incapacity on the part of a trustee to act in the administration of trust property is a sufficient reason for appointing a new trustee. *Re Bignold's Settlement Trusts*, 7 L R. Ch. App. 223; *Re Wheeler and Richard*, (1896) 1 Ch 315
- (b) It does not embrace the case of a trustee, who is an absconding bankrupt—though such a person would be unfit. *Re Watts*, 9 Ha. 106; *Re Itoche*, 2 Dr and War 287.
- (c) Nor does it cover the case of one who is permanently resident abroad. *Withington v Withington*, 16 Sim 104.

(2) Lunacy of person with power to appoint—Duty of Court.

Where the person, in whom the power of appointing is vested, becomes a lunatic, the Court will appoint a person to exercise such power or give the required consent on behalf of the lunatic. *Re Fuller*, 2 Ch. 551

(3) Refusing or retiring trustee, powers of

Under the English law, the power of appointment vested in a surviving or continuing trustee as such cannot be exercised by a refusing or retiring trustee. *Travis v Ilmworth*, 84 L.J. Ch. 665.

(4) Discretion of Court to remove trustee found unfit

In the matter of removal of trustees, the Court has a large discretion enabling it to so remove a trustee whenever it finds him unfit or incapable of performing the duties relating to the trust. *Lemann*, 22 Ch. D. 638; *Re Phelps*, 41 Ch D 351

8.—“A new trustee in his place by (a) the person nominated..... trust (if any).”

(1) Power to appoint, personal right.

The power to appoint, conferred on a person under an instrument of trust, is to be construed as a personal right, and cannot be taken as incident to the donee's estate. *East*, 8 Ch Ap 735

(2) Power to appoint, not imperative.

The statutory power to appoint is not imperative, and consequently, it is not obligatory on the donee of such a power to exercise the same by way of appointing a new trustee. *Itt Knight*, 26 Ch. D. 82.

(3) Donee of the power, when may act as trustee

It is only under special circumstances that the donee of the power may himself act as trustee, and that only on obtaining the sanction of the Court. *Montflore v Guedella*, 2 Ch. 723.

(4) Joint-holders of power to appoint new trustees—power of survivor.

Where the persons holding a joint power of appointment under an instrument of trust fail to agree as to the person to be appointed, the surviving or continuing trustees get the statutory power to appoint. *Re Shephard*. W. N. (1888). 234.

3.—“A new trustee...in his place by (a) the person nominated...trust (if any)—(Continued).

(5) Power of nominating two trustees in place of one.

Where a power of nominating the trustee is given to a certain person mentioned in the settlor's will, the donee of the power could, under Lord Cranworth's Act, appoint two trustees in place of one. *Re Breary*, W. N. (1873), 1248. T

(6) Appointment of new trustee—whether actual conveyance of trust estate necessary to perfect title.

(I) OLD LAW—DIVERGENT VIEWS.

- (a) The person to be appointed was not invested with the character of trustee, until he had both been nominated to the office by the donee of the power, and the trust property had also been duly conveyed or assigned. *Warburton v. Sandys*, 14 Sim. 622. U
- (b) In a later case it was held that the appointment of new trustees and the transfer of the trust property to them were two distinct and separate matters, that the transfer could only take place when the appointment was complete, and that it was not necessary, for the perfection of the appointment, that the trust property should be actually conveyed to the new trustee. *Noble v. Mynott*, 14 Beav. 471. Y
- (c) In another case, where there was no transfer of trust funds, on an appointment of a new trustee, it was held that a receipt given by the new trustee and the surviving trustee to X (who purchased a portion of trust property) conveyed a good title to the vendee. *Welstead v. Colville*, 28 Beav. 537. W

(II) PRESENT LAW IN ENGLAND—CONVEYANCE NOT NECESSARY.

In the present day, in England, an actual conveyance of the legal estate is not necessary for an appointment of new trustees being validly made. *Mara v. Browne*, (1896) 1 Ch. (C.A.), 199, 213. X

(7) Stamp on appointment of new trustees—English law.

Where a new trustee is appointed, the appointment requires a 10s. stamp. See Stamp Act (1891), (54 and 55 Vic. C. 39) Y

(8) Proper appointment of new trustees—Refusal of old to transfer trust estate—liability of the latter.

On a proper appointment of new trustees being made, if the old trustees, obstinately and perversely, without any sufficient reason, refuse to convey the funds to the former, the latter will be liable for costs occasioned by their wilfulness. *Re Wise's Trust*, 3 Ir. R. Eq. 599. Z

(9) Two trustees under a settlement—Retirement of both—Appointment of one instead, if valid.

Where there are two trustees under a settlement, and both retire at the same time, an appointment of a single trustee in their joint places is not valid. *Hulme v. Hulme*, 2 M. and K. 682. A

(10) New trustee to be within jurisdiction.

Generally the new trustees appointed should be persons amenable to the jurisdiction of the Court. *Re Gusbert*, 16 Jur. 852. B

8.—“A new trustee....in his place by (a) the person nominated....trust
(if any)—(Continued).

(11) Appointment of one trustee in the place of several is bad.

(a) Where a settlement constitutes three trustees, with a power of appointment of new trustees, and two died, the survivor should refuse to retire in favour of a single new trustee appointed in his place. *Barres v. Addy*, 9 L.R. Ch. App. 244; but see *Forster v. Abraham*, L.R. Eq. 351. C

(b) For the donee of the power should restore the original number. (*Ibid.*) D

(12) Appointment of relative of *cestui que trust* if valid.

(a) NOT VALID GENERALLY.

Generally, it is not right to appoint a near relative of the *cestui que trust* as trustee, on a change of trustees. Lewin, p. 808. E

(b) REASON THEREFOR.

(i) The reason is that, in case of such appointment, there will be a conflict between interest and duty. *Wilding v. Bolder*, 21 Beav. 222. F

(ii) The *cestui que trust* has a right to insist that the administration of the property should be confided to the care of some third person, who will not, in any case, be influenced by bias. Lewin, p. 808. G

(c) COSTS IN RESPECT OF SUCH APPOINTMENT—PERSON LIABLE.

If the relative be appointed and proceedings be instituted for his removal, the costs occasioned by such improper appointment should be thrown on the person who filled up the trust *Passingham v. Sherborn*, 9 Beav. 424. H

(13) Whether the donee of the power could appoint himself.

(a) GENERAL RULE.

(i) As a general rule, it is not competent to the donee of the power to appoint himself a trustee. *Tempest v. Lord Camoys*, 58 L.T.N.S. 221, 223. I

(ii) Because no one can be judge in his own case. (*Ibid.*) J

(b) SPECIAL CASES.

In special circumstances, such an appointment, if sanctioned by Court, may be made, as there is no absolute rule prohibiting him from doing so. *Montfoure v. Guedella*, (1903) 2 Ch. 723. K

(14) Infructuous appointment of new trustee—Effect.

Where a new trustee is ineffectually appointed, the old trustees may exercise the powers given to them by the settlement. *Warburton v. Sandys*, 14 Sim. 622; 14 L.J. Ch. 481. L

(15) *Lis pendens*—Effect of, on new appointment.

(a) COURT'S APPROVAL OF PERSON APPOINTED, NECESSARY.

If the administration of the trust be in the hands of the Court, the donee of the power cannot exercise it, without having first got the Court's approbation of the person proposed. *Webb v. Earl of Shaftsbury*, 7 Ves. 490; *Re Gadd*, L.R. 28 Ch. D. 184. M

(b) APPOINTMENT BY OLD TRUSTEES, EFFECT OF.

However, if the old trustees appoint without such leave having been previously obtained, the appointment is not altogether void. Lewin, p. 813. N

8.—“A new trustee....in his place by (a) the person nominated....trust (if any)—(Continued).

(c) ONUS OF PROOF IN SUCH CASES.

The onus of proving (by strictest evidence) the propriety of the appointment is on the old trustees under the settlement. (*Ibid.*) O & P

(d) COSTS, HOW TO BE BORNE.

The old trustees will be mulcted in costs in respect of such proof. (*Ibid.*) Q

(e) APPOINTMENT WHEN CANCELLED.

If the appointment was not proper, it would be cancelled. *Attorney-General v. Clack*, 1 Beav. 478. R

(16) Appointment of new trustees—Costs.

(a) COSTS, A CHARGE ON CORPUS, WHERE THE DECREE APPOINTS.

On the appointment of new trustees under a power, the costs, including those of the donee of the power, fall on the corpus of the trust estate. *Harvey v. Oliver*, (1887) W.N. 439; 59 L.T.N.S. 249. S

(b) SIMILAR CHARGE—WHEN THE COURT APPOINTS.

Where new trustees are appointed by Court, the costs are always thrown upon the estate. *Carter v. Sebright*, 26 Beav. 376. T

(c) PAYMENT OF COSTS, WHEN NO FUND AVAILABLE.

In the absence of a fund readily available, the costs are often paid by the tenant for life. (*Ibid.*) U

(d) COSTS OF COPIES OF TRUST DEED EXCLUDED.

Such costs do not include those of attested copies of the trust deed, which the new trustee is not entitled to demand. *Warter v. Anderson*, 11 Ha. 301. Y

(17) Appointment of new trustees—Their powers.

On an appointment of new trustees under a power, they can exercise all the powers given to the original trustees in that character. See Trustee Act (1893) (56 and 57 Vic. Ch. 53). W

(18) Appointment of new trustees—Inquiries to be made by them.

(a) NO ENQUIRIES NEED BE MADE IN RESPECT OF ANY CHARGE ON THE ESTATE.

If the trustees newly appointed omit to inquire of a retiring trustee whether he has notice of any charge, and then, having no notice, distribute the trust funds to the prejudice of the incumbrancer they will not be liable. *Phipps v. Lovegrove*, 16 L. R. Eq. 80. X

(b) INSPECTION OF DOCUMENTS INCUMBENT.

But they must look into the documents relating to the trust estate, to get themselves informed of what encumbrances their predecessors in office have had notice. *Hallows v. Lloyd*, 39 Ch. D. 686 (691). Y

(19) Suit for administration of trust—Appointment of new trustees—Sanction of Court necessary.

(a) Where a suit has been instituted for the administration of a trust and a decree has been made, that attracts the Court's jurisdiction, a trustee cannot afterwards exercise a power of appointment without the concurrent sanction of Court. 32 C. 448=9 C.W.N. 289. Z

8.—“A new trustee...in his place by (a) the person nominated...trust
(If any)—(Concluded). A

(b) In such a case, a trustee having a power of appointment of new trustees is not excluded from the right of nomination, but the sanction of the Court is necessary to his choice. (*Ibid.*) A

(20) **Executors not obtaining probate—Alienation by—Title of alienees—Appointment of trustees—Whether alienees can vote at election.**

Where, on the death of a testator, the executors mentioned in the will (without obtaining probate) alienate portions of the trust property, the title of the alienees is good, and they are entitled to vote for the appointment of trustees for the administration of the trust. 10 B. 468. B

(21) **Muhammadan Law—Appointment of trustees—Management of trust.**

(a) “WAKIF” COULD HIMSELF MANAGE.

Under both Suni and Shiah Law, the founder of “Wakf” has a right to reserve the superintendence thereof to himself or appoint some one else. 9 Bom. H.C.R. 19. C

(b) “TRUSTEE” TO BE AS DESCRIBED IN SETTLEMENT

(i) Where the donor has specified the class from whom the manager is to be selected, he cannot disregard his own trust deed and name a person not answering the proper description. (*Ibid.*) at p. 24. D

(ii) The appropriator is bound by the provisions of the “Wakfnama,” and his right of nomination of the person to succeed to the management on his death, must be confined to the class mentioned in the “Wakf-nama.” (*Ibid.*) E

(22) **Invalid appointment—Rectification.**

(a) RECTIFICATION—IF PARTIES CONCUR.

If, for some reason, the appointment is not validly made, the defect may be rectified by a subsequent appointment, where the proper parties concur. *Miller v. Priddon*, 1 D.M. and G. 335. F

(b) ORIGINAL TRUSTEES TO ACT UNTIL RECTIFICATION.

Until the matter is set right, the original trustees can act in the trust. (*Ibid.*) G

(23) **Appointment under invalid power—Rectification of power.**

Where the power of appointment itself was not in accordance with the terms of the settlement, and an appointment under it was made, the appointment can be confirmed by Court, and the power may also be rectified. *Tebbut v. Tebbut*, 1 De. G. and Sm. 506. H

(24) **Missing of part of trust estate—New trustees how appointed.**

Where a portion of the trust-estate is missing, new trustees should not be appointed by the Court in respect of the residue left. They must be appointed generally, and, with a view to protect the trustees, an enquiry must be directed as to what part of the trust-fund has been lost. *Bennett v. Burgis*, 5 Hare. 295. I

9.—“If there be no such person, or....last retiring trustee.”

(1) **New trustees—By whom to be appointed.**

The cl. (b) of the section is taken word for word from S. 27 of Lord Cranworth's Act (23 and 24 Vic. C. 145). J

(2) **Power of nomination to legal representative.**

(a) An appointment of a new trustee could be made by the personal representative of a sole trustee. *Re Shafto's trusts*, 29 Ch. D. 247. K

(b) But he cannot exercise such power, where the sole trustee has predeceased the testator. *Nicholson v. Field* (1899) 2 Ch. 511. L

(3) **Refusal by representatives of deceased trustee to appoint a new trustee—Application to Court for appointment—Costs of.**

Where the representatives of a deceased trustee decline to appoint a new trustee, and an application has been made to Court therefor, they cannot be mulcted in costs in respect of the application. *Re Wilcock*, 34 Ch. D. 508. M

(4) **Appointment by retiring trustee—Duty of such trustee.**

(a) **CONTROL OVER TRUST FUNDS.**

The retiring trustee (if he appoints a new one) must not part with the control of the trust-funds, before the new trustee has been actually appointed. *Pearce v. Pearce*, 22 Beav. 249. N

(b) **HIS LIABILITY IF THE APPOINTMENT FAILS.**

If he transfers the funds to the intended new trustee, and if by some unforeseen circumstances, the appointment fails, he still remains a trustee and will be answerable as such. (*Ibid.*) O

(5) **Retirement of one of two trustees—Appointment of co-trustee.**

(a) **SUBSTITUTION NECESSARY BEFORE RETIREMENT**

Where one of two trustees under a settlement is willing to retire, he cannot do so without previously substituting another in his place. *Adams v. Paynter*, 1 Coll. 592. P

(b) **APPOINTMENT OF CONTINUING TRUSTEE AS SOLE TRUSTEE, ILLEGAL.**

(i) Where the remaining trustee has got the power of appointing a new trustee, he is not justified in appointing the continuing trustee as sole administrator of the trust. *Wilkinson v. Parry*, 4 Russ. 272. Q

(ii) The reason is that such appointment would have the effect of relinquishing the trust, without the appointment of any successor. *Attorney-General v. Pearson*, 3 Mer. 353 (412). R

(6) **Both trustees wishing to retire—Appointment of new trustees.**

(a) **ENGLISH LAW.**

If there be two trustees and if they both retire at the same time, there must be two successive appointments before their retirement. *Stones v. Rowton*, 17 Beav. 308. S

(b) **INDIAN LAW.**

Under the Indian Trust Act, the trustees may appoint a new trustee with the consent of the Court and retire. *Powell*, p. 297. T

9.—“If there be no such person, or....last retiring trustee”---(Concluded).

(7) Appointment of new trustee—Concurrence of retiring trustee not necessary for appointment.

Where the power of appointing new trustees is given to the surviving or continuing trustees, and a trustee retires, his concurrence is not necessary to the appointment of a new trustee in his place, but such appointment rests with the other trustee or trustees who do not retire. *Re Norris*, L. R. 27 Ch. D. 388; *Re Coates to Parsons*, 84 Ch. D. 370. But see *Re Glenny and Hartley*, L.R. 25 C. D. 611. U

(8) Empowering continuing trustees to represent retired trustees.

Under the English Law, where proper persons cannot be found to succeed to retiring trustees, the Court may empower the continuing trustees to act, by themselves, in the place of such retiring trustees. *Re Stoke's Trusts*, 13 Eq. 333. Y

10.—“On an appointment....may be increased.”

(1) Retirement of a single trustee—Appointment of two instead.

(a) NOT VALID UNDER THE OLD LAW.

Until the Conveyancing and Law of Property Act (1881), a single trustee, on his retirement, cannot validly appoint more than one trustee to fill his place. *Rex v. Lezdale*, 1 Burr. 448. W

(b) REASON THEREFOR.

(i) Though the appointment of two in the place of one speaks to his having taken too much caution, he must not clog the property with unnecessary and cumbersome machinery. (*Ibid.*) X

(ii) It might have been the case that the idea of the settler was that an augmentation of the number of trustees would entail a deterioration of the vigilance which should be reasonably expected from each trustee individually. See Lewin, p. 802. Y

(iii) A great number of trustees may not do business better than a smaller number, and it would be attended with more expense.” *Per Lord Mansfield in Ex parte Dares*, 2 Y. and C.C.C. 468. Z

(c) INCREASE VALID UNDER PRESENT LAW.

By the Trustee Act (1893), unless a contrary intention appears in the instrument creating the trust, the number of trustees may, on the appointment of a new trustee, be increased. See (56 and 57 Vic. C. 53, S. 10). A

(2) Appointment of new trustees by Court—Increase or decrease of original number, left to Court's discretion.

(a) CASES WHERE THE NUMBER HAS BEEN INCREASED.

(i) Where the Court is appointing new trustees, it does not limit itself to the original number. Lewin, p. 803. B

(ii) Where there had been originally two trustees under the settlement, the Court has added two more. *Re Boycott*, 5 W.R. 15. C

(iii) In another case, instead of three, the Court has substituted four. *Plenty v. Wise*, 15 Beav. 356. D

10.—“On an appointment....may be increased”—(Concluded).

(b) CASES WHERE THE NUMBER HAS BEEN DIMINISHED.

(i) In several cases where the original number under the settlement was excessive, the Court, in the exercise of its discretion, has rightly reduced the number of trustees. *Re Leon* (1892) 1 Ch. 348; *Re Lee's Settlement Trusts* (1896) 2 Ch. 508. E

(ii) But, where there had been two trustees originally and where money is concerned, the Court, for the sake of more security, cannot substitute one instead. *Re Ellison's Trusts*, 2 Jur. N. S. 62. F

(8) Increase and decrease in number—English and Indian Law.

(a) ENGLAND—DIMINUTION IN NUMBER MAY BE ALLOWED.

In England, when a trustee wishes to retire and a successor cannot be found to fill his place, the Court can appoint the continuing trustees to be the sole trustees, in the place of the retiring and continuing trustees. *Re Stoke's Trusts*, L. R. 18 Eq. 333. G

(b) INDIA—NUMBER MAY BE INCREASED BUT NOT DIMINISHED.

It appears that, under such circumstances, in India, the number of trustees may be increased, but not diminished. Powell, 297. H

(4) In what cases the Court may increase the number of trustees.

(a) The Court may, by its original jurisdiction in an action, or under the Trustee Acts, increase the number even in cases coming within the statutory power. *D'Adhewar v. Bertrand*, 35 Beav. 19. I

(b) Where the power in the deed does not limit the number of trustees to be appointed, the Court could increase the number. *Meinertzhagen v. Davies*, 1 Coll. 335. J

(c) Even where there is no vacancy, the Court could increase the number of trustees. *Re Bracknbury*, 10 Eq. 45. K

(5) Power in instrument of trust in respect of increasing the number How far Court bound by.

The Court will have regard to expressions in the power authorising an increase in the number of trustees, but is not bound to act upon them. *Re Tempest*, 1 Ch. 485 (491). L

(6) Tendency of Courts, against reducing number of trustees.

The general tendency of the Courts is against reducing the number of trustees, except during the pendency of an administration suit. *Gardiner*, 33 Ch. D. 590. M

(7) Appointment of new trustee—Power of former trustee when ceases.

(a) Except when a new trustee has been effectually appointed, the former trustees need not cease to exercise the powers given to them by the deed of trust. *Warburton v. Sandys*, 14 Sim. 622. N

(b) It is only after the new trustee has been appointed that the former one should cease his control over the property. *Pearce v. Pearce*, 22 Beav. 248. O

II.—“The provisions of the section . before the testator.”

(1) Source of the clause.

The clause is taken *verbatim* from sub S. 4 of the Trustee Act (1893), S. 10. **P**

(2) Death of one of two trustees in testator's life-time—Power of appointing a new trustee by the other Divergent views

(a) CANNOT APPOINT

Where, under a settlement, the testator appoints two trustees and invests them with the power of appointing new ones, and a trustee dies in the testator's life time, it was held that the surviving trustee cannot appoint a new one. *Walter v. Rudgate* 15 Sim 596. **Q**

(b) APPOINTMENT COULD BE VALIDLY MADE

- In a subsequent case it was held that a trustee who has survived the testator may appoint a new trustee in the place of one who predeceased the testator. *Pe Hilday v. De C.* 10 Sim 67. *Nelson v. Wright* 20 T R 312. *Noble v. Mynott* 11 B C 471. **R**

(c) PERSONAL REPRESENTATIVES CANNOT APPOINT

But the personal representatives of trustee who have predeceased the testator cannot appoint the new trustee and the appointment should be made by the Court. *Re O'Leary* 21 C D 21. *Pe Ambler*, 59 L T 210. **S**

(3) Death of all trustees—Appointment.

Where all the trustee appointed by will die in the testator's lifetime, new trustee must be appointed by the Court unless there is some person nominated in the will for the purpose of appointing new trustees. *Nichols v. Field*, (1893) 2 Ch 511. **T**

- 74.** Whenever any such vacancy or disqualification occurs, and it is found impracticable to appoint a new trustee under section 73, the beneficiary may, without instituting a suit, apply, by petition to a principal Civil Court of original jurisdiction, for the appointment of a trustee or a new trustee², and the Court may appoint a trustee or a new trustee accordingly.
- ¹ Appointment by Court.

In appointing new trustees, the Court shall have regard (a) to the wishes of the author of the trust as expressed in, or to be inferred from, the instrument of trust; (b) to the wishes of the person (if any) empowered to appoint new trustees, (c) to the question whether the appointment will promote or impede the execution of the trust; and (d) where there are more beneficiaries than one, to the interests of all such beneficiaries.

(Notes).

See notes on Ss. 60 and 73, *supra*.

1.—“Appointment by Court.”

(1) Principle of appointing a new trustee—General jurisdiction of Court

(a) Since trustees exist for the benefit of the *cestui que trust* in every case in which the Court is satisfied that the continuance of a trustee will prevent the trusts being properly executed it will remove him from the office, and appoint others instead. *Testator d's B'ss* 9 A C 371 (386) **U**

(b) It is a jurisdiction assumed by the Court independently of statute but as ancillary to its duty to see that the trusts are properly executed (*Ibid*) **Y**

(2) When Court would interfere to appoint trustees

Where the Court thinks it expedient to appoint a new trustee or trustees and where it is found inexpedient difficult or impracticable so to do without the intervention of the Court it may appoint new trustees. S 25 of Trustee Act (1993) **W**

(3) Trustee a minor—Appointment of a new trustee by Court

Where the trustee under the settlement was a minor the Court is justified in appointing a new trustee instead. *Stichard's* 33 L J Ch 171 **X**

(4) Cases in which the Court would appoint a new trustee

(a) IN DEFAULT OF TRUSTEES ORIGINALLY APPOINTED

(i) Whenever the testator has not appointed any trustees the Court has jurisdiction to appoint trustees under the will. *Dillon's* 10 Mont 619 580 **Y**

(ii) In default of any trustees under the original settlement and in the absence of express power of appointment in the instrument of trust it is competent to the Court to make the necessary appointment. *Re Williams* 36 Ch D 251 **Z**

(b) DOUBTS AS TO THE EXISTENCE OF STATUTORY POWER OF APPOINTMENT

In cases of the Court will itself proceed to appoint new trustees. *Re Woodgate*, 5 W R 418. **A**

(c) WHERE THE ENTITLED PERSONS ARE NOT IN A POSITION TO APPOINT

Where the persons given the power of appointment are not in a position to exercise it as where the husband and wife jointly invested with such powers, but become judicially separated the Court will appoint. *Re Somerset*, WN (1887) p 122 **B**

(d) IN RESPECT OF THE SEPARATED PARTS OR SURVIVANCE OF TRUST

It has been held to be within the power of a Court to sever a trust and appoint a trustee in respect of the separated part. *Coker v Todd* 29 W. R 502 **C**

(e) ON FORMER TRUSTEE PERMANENTLY RESIDING ABROAD

Where the trustee has taken permanent residence abroad the Court will remove him and appoint a new trustee in his place. *Le Regnold*, 7 Ch Ap 223 **D**

(f) ON TRUSTEES UNFITNESS ON ACCOUNT OF AGE AND INFIRMITY

Where the trustee had become unfit to perform his duties owing to old age and infirmity the Court exercised its power of appointing a new trustee. *Jeman* 22 Ch D 133 **E**

1.—“Appointment by Court”—(Concluded).

(g) IN THE PLACE OF AN INFANT TRUSTEE.

The Court can appoint a trustee in the place of an infant trustee, who will, however, have to be restored, on his application for the purpose, after he becomes a major. *Re Shelmeidne*, 38 L.J.Ch. 474. F

(5) Procedure in appointing new trustees—Originating summons.

(a) In England, the procedure under the Trustee Act, 1893, in the matter of the Court's removing the old and appointing a new trustee, is, generally, by means of originating summons. *Re Dawson*, 48 W.R. 78. G

(b) The summary procedure by means of originating summons will not be followed by the Court, unless, where the trust is not clear in the instrument, it is established to the satisfaction of the Court. *Re Martin's Trusts*, W.N. (1886), p. 183. H

(6) Order dismissing application for removal of trustee, not appealable.

An order of Court dismissing an application for the removal of a trustee is not appealable as an order, nor does it constitute a decree within the Code of Civil Procedure. 19 A 131 I

2.—“The beneficiary may... trustee or new trustee.”

(1) High Court to be moved by petition.

In England, for the purpose of appointing new trustees, the High Court should be moved in the Chancery Division by a petition. S. 25 of the Trustee Act (1893). J

(2) Application for appointment of new trustees—Costs of.

The costs are not taxable on the higher scale, merely because the amount of the trust funds is considerable. *Re Spethque*, 32 W.R. 385. K

3.—“Rules for selecting new trustees.”

(1) Directions of settlor to be adhered to.

(a) The Court will have regard to the wishes of the author or authors of the trust, if expressed in the trust instrument, or clearly to be collected from it, (i.e.), it may refuse to appoint some person distinctly excluded by its terms. *Middilton v Reay* 7 Ha. 106. L

(b) It is not competent to the Court to proceed to appoint new trustees, in opposition to the wishes of the person vested with the power of such appointment. *Re Higginbottom* 3 Ch. 132. M

(2) Appointment to benefit all the beneficiaries.

The Court will not appoint a person to be a trustee, with a view to the interest of some of the persons interested in the trust, in opposition to the wishes of the author of the trust, or to the interests of the other beneficiaries. *Re Tempest*, 1 Ch. 485. N

(3) Appointment to further the execution of the trust.

The Court will, in appointing trustees newly, have regard to the question whether the appointment will promote or impede the execution of the trust. *Re Tempest*, 1 Ch. 485. O

(4) Proper persons for appointment—General rule.

Generally, a solvent, independent person, resident within the jurisdiction and of undoubted integrity, should, wherever practicable, be chosen for appointment. Godefroi, p. 720. P

3.—“ Rules for selecting new trustees ”—(Concluded).

(5) Appointment of *cestui que trust* or her husband as trustee—if valid.

(a) A *cestui que trust* is never appointed by Court as a trustee, in consequence of the probability of conflict between his interest and duty. *Forster v. Abraham*, L.R. 17 Eq. 351. Q

(b) Nor will the Court appoint the husband of the *cestui que trust* a trustee of his marriage settlement, where the wife had a life interest to her separate use without power of anticipation, unless every effort to obtain a stranger has proved unavailing. *Ex parte Clutton*, 17 Jur. 988; *Re Dixon*, 21 W.R. 220. R

(6) Relative of *cestui que trust*, if proper person to be appointed.

(a) An appointment of near relations of the *cestui que trust*, as trustees, is not valid. *Wilding v. Bolder*, 21 Beav. 222. S

(b) Especially if the relative was on bad terms with the settlor. *Re Tempest*, 1 Ch. 495. T

(7) Appointment of new trustees out of jurisdiction, when valid.

Where all the beneficiaries are permanent residents out of the jurisdiction, the Court may appoint new trustees resident out of the jurisdiction. *Re Laddard*, L.R. 14 Ch. D. 310. U

(8) Refusal of continuing trustee to act with the trustee proposed.

Where the continuing trustee refuses to act with the proposed new trustee, the mere refusal will not be a sufficient ground for the Court to refrain from appointing him. *In re Tempest*, L. R. 1 Ch. App. 495. Y

(9) Appointment of new trustee in Appellate Court—Competency of the trustee—Evidence subsequent to original hearing, if allowable in respect of.

Where the question of the appointment of a new trustee is brought before the Appellate Court for re-hearing, in considering the competency or otherwise of the new trustee, the Court is not precluded from taking into consideration evidence of occurrences subsequent to the case in the Court of first instance. *In re Tempest*, L. R. 1 Ch. App. 485. W

(10) Appointment of infant as trustee, if valid.

An infant should not be appointed a trustee, since he cannot act in all the matters relating to the trust, though he can exercise a common law power. *King v. Bellard*, 1 H. and M. 343. X

(11) Appointment of female as trustee, if valid.

It is not desirable to appoint a female, whether married or unmarried, to be a trustee. *Brook v. Brook*, 1 Beav. 531; *Avery v. Griffin*, 6 Eq. 606; but see, *Re Campbell*, 31 Beav. 176. Y

75. Whenever any new trustee is appointed under section 73 or section 74, all the trust-property for the time being vested in the surviving or continuing trustees or trustee, or in the legal representative of any

Vesting of trust-property in new trustees¹.

trustee, shall become vested in such new trustee, either solely, or jointly, with the surviving or continuing trustees, or trustee, as the case may require.

Every new trustee so appointed, and every trustee appointed by a Court either before or after the passing of this Act, shall have the same powers, authorities, and discretions, and shall in all respects act, as if he had been originally nominated a trustee by the author of the trust.

Powers of new trustees 2.

(Notes).

1.—“Vesting of trust-property in new trustees.”

(1) Provisions of the clause—Source of.

The provisions of clause 1 have been taken from the Trustee Act 1893, S. 10. Z

(2) Court to make a vesting order—English law.

(a) In England, where the new trustee is appointed by Court, the Court must make a vesting order. Ss. 26, 32, 34, 35 and 36 of Trustee Act, 1893. A

(b) In other cases, the property must be vested in new trustees, either by the ordinary mode of transferring property, or by vesting declarations in the deed by which a trustee is appointed. (*Ibid.*) B

(c) Where either of these cannot be done, the property must be vested in new trustees, by an application to the High Court, Chancery Division. (*Ibid.*) C

(3) Discharge of an executor by Court—Vesting of property in the continuing executor.

(a) The Court has power to discharge the executor, if the circumstances justify the Court in doing so. 29 B. 188 (190). D

(b) It is quite open to the Court, if it so pleases, to discharge the executor in regard to future liability and future acts, and not in the least affect his liability in regard to past transactions. 29 B. 188 (190). E

(c) As to his liability for the past, he must continue to be liable for anything he has done or left undone. The discharge only relieves him from his duties in the future. 29 B. 188 (191, 192). F

2.—“Powers of new trustees.”

(1) Exercise of powers by new trustees.

Every new trustee appointed, as well before as after all the trust property becomes, by law, or by assurance, or otherwise, vested in him, shall have the same powers, authorities and discretions, and may in all respects act, as if he had been originally appointed a trustee by the instrument, if any, creating the trust. See S. 10 of Trustee Act (1893), Sub-S. 8. G

(2) No trustees under a will—Court's jurisdiction to appoint them.

Where no trustees have been appointed by the testator under the settlement, the Court has an inherent jurisdiction to appoint them. *Dookin v. Brunt*, L. R. 6 Eq. 580. H

(3) Duty of new trustees with regard to ascertaining prior incumbrances.

(a) The new trustees are bound to ascertain, as far as possible, from the documents on hand, the incumbrances, if any, created by the beneficiaries, of which the retiring trustees have had notice. *Hallows v. Lloyd*, 89 Ch. D. 686. I

2.—“Powers of new trustees”-(*Concluded*).

- (b) It is not the duty of the new trustees, however, to enquire of the retiring trustee whether he has had notice of any incumbrances by the beneficiaries. *Phypys v. Lovegrove*, 16 Eq. 90. J

76. On the death or discharge of one of several co-trustees, the trust survives, and the trust-property passes to the others, unless the instrument of trust expressly declares otherwise.

Survival of trust

(Notes).

N.B.—See also notes on S. 44, *supra*.

1.—“Survival of trust.”

(1) A “bare authority” to trustees—Death of a trustee—Effect of.

- (a) A bare authority given to several trustees is determined by the death of any one of them. *Attorney General v. Clegg*, 1 Atk. 356. K
- (b) But, if the authority be coupled with any interest, it passes to the survivor. *Bepton v. Bury*, 2 P. Wms. 626, *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103 (121, 124). L

(2) Power in settlement for restoring original number on death of a trustee—Effect of, on survival of trust.

- (a) The survivorship of the trust is not affected by the deed of trust containing a power to restore the original number of trustees by new appointments, on the death of any one of the trustees. *Warburton v. Sandys*, 14 Sim. 622, *Jacob v. Lucas*, 1 Beav. 436. M
- (b) In such cases, unless there is something in the deed of trust, which specially manifests an intention on the part of the settlor to defeat the survivorship of the trust, the trust will survive. *Foley v. Wither*, 2 J. and W. 215, *Jacob v. Lucas*, 1 Beav. 436. N

(3) Trust estate passes to the survivors among joint trustees.

- (a) The trust estate being taken by the trustees as joint-tenants, such estate with the powers vested in them ordinarily passes to the survivors among them. *Eyre v. Countess of Shaftesbury*, 2 P. Wms. 103; *Agnew*, p. 335. O
- (b) Where a power vested in several persons together happens to be coupled with any interest, such power does not cease on the death of any one of them, but passes to the survivors. *Attorney General v. Clegg*, 1 Atk. 356. P

(4) Power vested in two trustees jointly, not exercisable by either of them singly.

Any power vested in two particular trustees jointly can be regarded as inseparably annexed to the trust as not to be exercisable by either of them singly. *Zambaco v. Cassavetti*, 11 Eq. 439. O

CHAPTER VIII.

OF THE EXTINCTION OF TRUSTS.

Trust how extinguished.

77. A trust is extinguished—

- (a) when its purpose is completely fulfilled 1; or

- (b) when its purpose becomes unlawful ², or
 (c) when the fulfilment of its purpose becomes impossible by destruction of the trust-property or otherwise ³, or
 (d) when the trust, being revocable, is expressly revoked ⁴.

(Notes)

Scope of section

The Act here declares the four cases in which a trust is extinguished by operation of law R

1. "When its purpose is completely fulfilled."

Complete fulfilment of purpose of trust—Effect

On the purpose of a trust being completely fulfilled the trust is extinguished.

Illustration—When property is given to trustees on trust to apply the income towards the maintenance and education of the children of X, and on the young child attaining a certain age, upon further trust to distribute the principal among their children in certain proportions, the trust is extinguished when the youngest child attains the age mentioned and the fund has been distributed. See Agnew p 335 S

2. "When its purpose becomes unlawful."

See S 4 and notes *supra*

T

3. "When the fulfilment otherwise."

When owing to the property having been lost or destroyed, there is nothing left to apply towards the purposes of the trust, the trust will be extinguished. *Illustration* (a) 1 J Ch 301 U

4. "When the trust being revocable, is expressly revoked."

N B.—As to when a trust can be revoked see S 76 *infra*

Revocation of trust. 78 A trust created by will may be revoked ¹ at the pleasure of the testator

A trust otherwise created can be revoked only—

(a) where all the beneficiaries are competent to contract—by their consent,

(b) where the trust has been declared by a non-testamentary instrument, or by word of mouth—in exercise of a power of revocation expressly reserved to the author of the trust, or

(c) where the trust is for the payment of the debts of the author of the trust, and has not been communicated to the creditors ²—at the pleasure of the author of the trust

Illustration

¹ A conveys property to B in trust to sell the same, and pay out of the proceeds the claims of A's creditors. A reserves no power of revocation. If no communication has been made to the creditors A may revoke the trust, but if the creditors are parties to the arrangement, the trust cannot be revoked without their consent.

(Notes).

1.—“A trust created by will may be revoked.”

(1) Means of revocation adopted, when effectual.

In cases where the testator had used the means of revocation, only with the intention of effecting an altered disposition of the property, if the desired alteration cannot be given effect to, the revocation shall have no effect. *Ex parte Lord Ilchester*, 7 Ves. 348. Y

(2) Destruction of will, when amounts to revocation.

In order that the destruction of a will may amount to its revocation, such destruction must have been caused by a person interested in the revocation. *Doe v. Alice Harris*, 6 A. and E. 209. W

2.—“Where trust is for....trust.”

A.—Irrevocable trusts.

(1) Existence of debt—Assurance.

The existence of a debt is always a sufficient consideration for supporting an assurance as valid and irrevocable as against the grantor. See *Rice v. Rice*, 2 Drew. 84. X

(2) Form which assurance assumes.

Indeed this assurance often assumes the form, either of a conveyance in satisfaction or part satisfaction of the debt or of a security accompanied with a forbearance to sue. See *Crofts v. Fens*, 4 Ir. Ch. Rep. 319. Y

(3) Trustee himself creditor—Deed irrevocable.

Where a certain person is indebted to another, and conveys an estate to him by way of security, the deed, though no money passed at the time, and there was no previous arrangement, cannot be revoked by the former, but the latter may insist on the benefit of it. *Suggers v. Evans*, 5 Ell. and Bl. 367. Z

(4) Creditor not party to deed—Enforcement of trust.

Though a creditor is not a party to the deed, yet if, by an arrangement between him and the debtor, an estate is vested in a trustee for securing the debt, he can enforce the trust. *Wilding v. Richards*, 1 Coll. 661.

B.—Revocable trusts.

(1) Trust when revocable.

But, where a debtor, without communication with his creditors, and only from motives of personal convenience, as on going abroad, vests an estate in trustees on trust to pay his debts, the trustees are mere mandatories, and the deed confers no right on the creditors who are neither parties, nor privies, and the debtor may at any time, at his pleasure, revoke or vary the trust, or call for a re-transfer of the property. *Acton v. Woodgate*, 2 M. and K. 492; *Cornthwaite v. Frith*, 4 De. G. and Sm. 552; *Johns v. James*, 8 Ch. D. (C. A.), 744. B

(2) Trust—Revocation—Condition—Payment of amount to trustee.

Plaintiff, being indebted and unable to manage his estate, made over the same to his mother by a trust-deed, so that she might manage it for him and pay off his debts. There was no provision as to when the trust was to terminate. Six years after the deed, but before all the debts had been paid off, plaintiff sued to redeem the property, and offered to

2.—“Where trust is for...trust”—(Continued).

B.—Revocable trusts—Concluded).

pay the amount which might be found due from him to the defendant. *Held*, there was nothing in the deed to prevent plaintiff revoking the trust, after satisfying the claims of the trustee. 183 P. R. 1889 (8 C. 887, D.).

(3) Trust for benefit of creditors, when ceases to be revocable.

(a) A trust created by a debtor for the benefit of his creditors is revocable by the former, except when the latter have been parties to the conveyance on trust or, on communication by the trustee, they have refrained from proceeding against him. *Acton v. Woodgate*, 2 My. and K. 492, *N. in Johns v. James*, 8 Ch. D. 744.

(b) After the trustee has taken possession of the property assigned on trust and communicated the same to the creditors, the trust ceases to be revocable. *Hutland v. Lums*, 15 Q.B. Rep. 719; *Lewin*, p. 600.

(4) Right to revoke being personal, not exercisable by representatives of settlor.

Where the trust has been communicated to the creditors, the settlor cannot revoke it without their consent, also, the right of revocation being a personal right in the settlor, in the case of *post obit* trusts, his representatives cannot exercise such right. *Fitzgerald v. White*, 37 Ch. D. 18. See *Lewin*, p. 601.

(5) Onus on creditors to establish irrevocability of trust in their favour.

In establishing the irrevocability of the trust, the onus is upon the creditors to show that they have assented to and acted upon the provisions of the trust deed. *Fried v. Donoughmore*, 1 Dru. and Wr. 227. See *Nicholson v. Juton*, 2 K. and J. 23.

(6) Trust not enforceable after author's death.

The creditors cannot enforce the trust after the author's death. *Garnard v. Lord Landisdale*, 3 Sim. 1.

C.—General.

(1) Voluntary settlement on trusts, irrevocable when once acted upon.

A complete settlement on certain specified trusts in favour of volunteers having been made, and the trusts acted upon, no subsequent voluntary settlement can have the effect of revoking it. See *Newton v. Askew*, 11 Beav. 145.

(2) Even when the property becomes re-vested in the settlor.

A settlor cannot revoke a voluntary settlement made by him, even when the property becomes re-vested in him, for, in such a case, it can vest in him only as a trustee and not absolutely. *Ellison v. Ellison*, 6 Ves. 656. See *Paterson v. Murphy*, 11 Hare 88.

(3) Voluntary trust subject to payment of settlor's debts, revocable in effect.

A voluntary trust, created subject to the payment of the debts that may be due by the settlor at his death, may in effect be revoked by the settlor creating new debts. *Markwell v. Markwell*, 34 Beav. 12.

2.—Where trust is for... (General) (Concluded).

C.—General.—(Concluded).

(4) Voluntary settlement—Revocation of trust.

Where an unmarried person created, by a voluntary settlement, trusts for himself for life, and, after his death, for his issue and widows with ultimate trusts over, with a provision therein for the revocation of the trusts with the trustee's consent, and, after his subsequent marriage, executed a deed of revocation, held, upon the trustee refusing to hand over the property, that the settlement could not be revoked, as there was an infant beneficiary in the person of his minor wife. 8 C. 887. L

3.—“Illustration.”

The illustration is taken from *Johns v. James*, L. R. 8 Ch. D. 744. L1

Revocation not to defeat what trustees have duly done ¹.

79. No trust can be revoked by the author of the trust so as to defeat or prejudice what the trustees may have duly done in execution of the trust.

(Notes).

1.—“Revocation... duly done.”

Revocation not to have retrospective effect.

It is a rule of equity that no revocation can have retrospective effect. So, acts already performed in execution of the trust cannot be affected by any subsequent revocation of it. *Wilding v. Richards*, 1 Coll. 655 M

CHAPTER IX.

OF CERTAIN OBLIGATIONS IN THE NATURE OF TRUSTS.

Scope of chapter.

This chapter deals with what are known to the English law as constructive and resulting trusts. N

Where obligation in nature of trust is created.

80. An obligation in the nature of a trust is created in the following cases.

81. Where the owner of property transfers or bequeaths it,

Where it does not appear that transfer or intended to dispose of beneficial interest ¹.

and it cannot be inferred, consistently with the attendant circumstances ², that he intended to dispose of the beneficial interest therein, the transferee or legatee must hold such property for

the benefit of the owner or his legal representative.

Illustrations.

(a) A conveys land to B without consideration, and declares no trust of any part. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in the land. B holds the land for the benefit of A.

(b) A conveys to B two fields, Y and Z, and declares a trust of Y, but says nothing about Z. It cannot, consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in Z. B holds Z for the benefit of A.

(c) A transfers certain stock belonging to him into the joint names of himself and B. It cannot consistently with the circumstances under which the transfer is made, be inferred that A intended to transfer the beneficial interest in the stock during his life. A and B hold the stock for the benefit of A during his life.

(d) A makes a gift of certain land to his wife B. She takes the beneficial interest in the land free from any trust in favour of A, for it may be inferred from the circumstances that the gift was for B's benefit.

(Notes)

General

(1) Scope of section

This section and the next section deal with what we know as "Resulting Trust."

(2) General rule

The general rule is that when ever upon a conveyance, devise or bequest, it appears that the grant or devise or legatee was intended to take the legal estate merely for the equitable interest, or so much of it as is left undisposed of will result if arising out of the settlor's relict, to himself or his heirs, and if out of his personality, to himself or his executor. *Lewin* p 158 *Scull v Dunning*, 10 Beav. 315. P

(3) Principle of resulting trusts

The——is that the property has been purchased with money belonging to another with an implied trust that it should belong to that other person to whom the money also belonged but that if the latter intended that there should be no such trust no such implied trust could arise by implication. 11 M.T.A 433 (P.C.) Q

1. — "Where it dispose interest."

(1) Donor's intention —Donee not to take beneficially

(a) When it appears to have been the intention of the donor that the donee is not to take beneficially there is a resulting trust in favour of the donor or his representative. *Lewin* p 162. R

(b) The defendant conveyed her house to the plaintiff without receiving any consideration but under the hope that the plaintiff would incur the necessary funeral expenses of the defendant. Plaintiff sued for possession and it was held that, as no consideration was intended to pass, there was a resulting trust in favour of the defendant, which would preclude plaintiff from claiming possession contrary to his wishes. *Mutham v Nairn* Bom P.J. 1699 p 125. S

(2) Disposal of beneficial interest, meaning of

The words 'the disposal of beneficial interest therein' have reference to the transfer of bequest referred to in the earlier part of the section, and if it is legally proved that the transferor or testator did not intend by such transfer or bequest to part with the beneficial interest, the transferor or legatee is a trustee for the transferor or his legal representative, and cannot claim the property under such transfer or bequest. *Per Sankaran Nair* J in 2 T.C. n 4 at 5. T

2.—“It cannot be inferred... attendant circumstances.”

“Attendant circumstances”—Construction of.

By his will, dated April 19, 1892, J gave all his properties to P and appointed him his sole executor. The will, however, contained a proviso that the testator had no doubt that the executor would carry out his wishes. After the testator's death a letter signed by him was discovered addressed to P and dated April 28, 1895, in which he requested his executor to sell some of his properties and Bank shares and remit the proceeds to his London Bankers for being transmitted to his brother R.

The testator's next of kin, on the strength of that letter brought a suit for administration of the testator's estate against the heirs and legal representatives of P.

(1) *Held per White C J*—(1) that the letter of April 28 1895 was inadmissible for the purpose of establishing a trust in favour of the testator's brother R. 31 M 187 1

(2) That the expression in the will that the testator had no doubt that the executor would carry out his wishes was not inconsistent with the testator's intention to pass the beneficial interest to the legatee (*Briggs v Penny*, 42 E R 371 *Stacy v Waller* 5 Ch D 2225 1.)

(3) that “attendant circumstances” in S 91 means an circumstance in existence at the date of the execution of the will, and means the same is surrounding circumstance.

(1) The letter of the testator is inadmissible as evidence of an attendant circumstance to show that the testator did not intend to dispose of the beneficial interest and when the attendant circumstance is disclosed by the testator, showed an intention to give the property to R, it also showed that the next of kin *qua* next of kin should not get it, and

(5) That the letter was not admissible for the purpose of establishing even a resulting trust in favour of the testator's next of kin (*The Mad dock, Llanelli v Washington* (1902) 2 Ch 220 71 L J 567 36 L R 644, 50 W R 598, *Bishop of Cliche v Young* 2 Ves. Sen 91 1. U

(b) *Held per Sanjivan Nair J*—(1) that the letter was an attendant circumstance within the meaning of S 81 that it was intended to accompany or follow the will and therefore could be taken into consideration to discover the intention of the testator and (2) that the combined effect of the will and the testator's letter was to pass the beneficial interest to R and to make P only a trustee for him 2 I C 4 Y

Miscellaneous.

(1) Other rules.

(a) In trusts for sale of realty, the undisposed of proceeds result to the heir, not to the executor *Stanley v Brooks*, 1 P Wms 390 W

(b) Money to be laid out on land results to executor *Cute v Wernald* L R 10 Ch D 172 X

(c) Where there is a power to appoint a settled fund the executor of the power takes the part appointed entirely out of the settlement *Cooke v The Stationer's Company*, 3 M. and K. 262 (264). Y

Miscellaneous—(Continued).

- (d) In a gift of the whole, subject to a charge that may not arise, no trust results, e.g., gift to A. charged with a legacy to B, B dying during the testator's lifetime. "If an estate is devised, charged with legacies, and the legacies fail, no matter how, the devisee shall have the benefit of it and take the estate." *Kennell v. Abbott*, 4 Ves. 802; *Dawson v. Small*, L.R. 18 Eq. 114. Z
- (e) The interest that would have resulted may be disposed of by will. A lapsed legacy will go to the residuary legatee, if the testator specifically declare that the proceeds of the sale shall be considered as personal estate. *Durou v. Nottena*, 1 Ves. Sen. 321. A

(2) Ways by which trusts result.

(i) BY PRESUMPTION.

The settlor's intention of excluding the person invested with the legal estate from the usufructuary enjoyment, may either be presumed by the Court or be actually expressed upon the instrument. *Lewin*, p. 159. B

(ii) FROM INTENTION EXPRESSED.

A trust results, by operation of law, where the intention not to benefit the grantee is expressed on the face of the instrument. *Kindell v. Ganger*, 5 Beav. 300. *Re Tarmen's Estate*, L.R. 8 Ch. D. 584. C

(iii) WHERE NO TRUST IS DECLARED OF ANY PART.

If an estate be granted either without consideration or for merely a nominal one, and no trust is declared of any part, then if the conveyance be simply to a stranger, and no intention appears of conferring the beneficial interest, as the law will not suppose a person to part with property without some inducement thereto, a trust of the whole estate will result to the settlor. *Hayes v. Kingdome*, 1 Vern. 33. D

(iv) WHERE TRUST IS DECLARED OF PART ONLY.

Where trust is declared of part, the trust of the residue results. *Northen v. Carneque*, 4 Drew. 587; *Cottmington v. Fletcher*, 2 Atk. 155. E

(v) MISTAKES.

The Court will not allow the grantee to retain the beneficial interest, if there was any mistake on the part of the grantor. *Manning v. Gill*, L.R. 13 Eq. 495; *Darves v. Olty*, 35 Beav. 208. F

(vi) FRAUD AND MALAFIDES.

(a) Similarly if there were *mala fides* on the part of the grantee. *Lloyd v. Spillett*, 2 Atk. 148; *Young v. Peachey*, 2 Atk. 154. G

(b) But there will be no resulting trust, if the grantor himself intended a fraud upon the Law. *Cottmington v. Fletcher*, 2 Atk. 155. H

(vii) VAGUENESS IN THE INSTRUMENT.

Where trusts declared in an instrument are too vague to be executed, the trust results to settlor. *Fowler v. Garlike*, 1 R. and M. 232. I

(viii) ILLEGALITY OF TRUST.

Where a settlor declares trusts which are unlawful,—the trust results to him. *Arnold v. Chapman*, 1 Ves. Sen. 108; *Page v. Leapingwell*, 18 Ves. 463. J

Miscellaneous—(Concluded).

(8) Parol evidence—Admissibility—Rebutting.

As this species of trust is based upon a presumption of law, it may be rebutted, in the case of non-testamentary instrument, by positive evidence that the intention of the settlor was to transfer the beneficial interest. *Fowkes v. Pascoe*, L.R. 10 Ch. App. 343; *Cook v. Hutchinson*, 1 Keen 42 (50). **K**

(4) Instances where such parol evidence was admitted.

- (a) Where the non-beneficial character of the gift is merely presumed from the general scope of the instrument, parol evidence is admissible both in support and contradiction of the presumption. *Wellis v. Wellis*, 2 Atk. 71. **L**
- (b) A woman purchased sums of stock in the names of herself and the son of her daughter-in-law; there was nothing to show on the face of the instrument that the son of the daughter-in-law was merely a trustee, and so the presumption of resulting trust was allowed to be rebutted by oral evidence. *Owkes v. Pescol*, 44 L.J. Ch. 367. **M**

(5) Exceptions under English law.

(a) CHARITIES.

- (i) Settlements to charitable purposes are an exception from the law of resulting trusts. Where no object is expressed, the Court will direct the application of the estate to the charity. Where the rents increase, the surplus will be applied to charitable purposes, unless the settlor notices the property to be of a certain value and appropriates part only to charity. *Attorney-General v. Herrick*, Amb. 712; *Attorney-General v. Corporation of South Molton*, 14 Beav. 357. **N**
- (ii) The doctrine in favour of charities was established before trusts were settled. "Where the subject still unprejudiced by authority, there is little doubt that the Court would, at the present day, follow the general principle, and hold a trust to result." *Attorney-General v. Mayor of Bristol*, 2 J. and W. 294 (307). **O**

(b) PRESUMPTION OF ADVANCEMENT

- (i) If the conveyance be to a wife or child, it will be presumed an advancement, and the wife or child will be entitled beneficially. *Christ's Hospital v. Budgen*, *Jennings v. Sellick*, 1 Vern. 467. **P**
- (ii) But *contra* in India, where *benami* transactions are very frequently entered into. No such presumption will be raised. *Powell*, p. 313. **Q**

(c) TRUST FOR MARRIAGE SETTLEMENT.

If a person invest a sum in the names of the trustees of his marriage settlement, no trust will result, the presumption being that he meant it to be held upon the trusts of the settlement. *Re Curtis Trusts*, L.R. 14 Eq. 217. **R**

82. Where property is transferred to one person for a considera-

Transfer to one for consideration paid by another 1.

tion paid or provided by another person, and it appears that such other person did not intend to pay or provide such consideration for the benefit of the transferee, the transferee must hold the property for the benefit of the person paying or providing the consideration.

Nothing in this section shall be deemed to affect the Code of Civil Procedure, section 317, or Act No. XI of 1859 (*to improve the law relating to sales of land for arrears of revenue in the Lower Provinces under the Bengal Presidency*), section 36.

(Notes).

General.

(1) Object of section.

This section provides for those cases where property is purchased *benami* in the name of another, and carries out the principle of equity that, where there is a purchase by A in the name of B, there is a resulting trust of the whole to A. 29 Bom. 306. S

(2) Scope of section.

(a) This section does not in any way affect S. 317 of the Civ. Pro. Code, which relates to a purchase *benami* at a sale in execution of a decree: The right of the purchaser cannot be questioned. 22 A. 494. T

(b) Whether the nominal owner be a child or stranger, the purchase made with the money of another is *prima facie* assumed to be made for the benefit of that another. 6 Bom. 717. U

I.—“Transfer....by another.”

(1) Benami transaction—Property bought by father in son's name.

Where a purchase is made by a Hindu or Mahomedan in the name of his son, the presumption is in favour of its being a *benami* purchase. 6 Bom. 717, 13 W.R. 1 (P.C.); 20 W. R. 269; 9 W.R. 338. Y

(2) Purchase in the name of a stranger.

Where property is purchased in the name of a stranger, it results to the man who advances the purchase-money. But no trust will result, unless the person advance the money in the character of a purchaser. *Willis v. Willis*, 2 Atk. 71; *Finch v. Finch*, 15 Ves. 43 at 50. W

(3) Purchase in the name of child or wife.

Where a purchase is made by a parent in the name of a child, there will *prima facie* be no resulting trust for the parent, but a presumption arises that an advancement was intended. The presumption also arises in the case of a wife. But in India no such presumption exists. *Finch v. Finch*, 15 Ves. 43 at 50; *Kingdom v. Bridges*, 2 Vern. 67; 13 M. I. A. 232. X

(4) English law—Extension of principle.

The doctrine has been applied to the case of an illegitimate son. It applies to daughters as well as sons, grandchild or nephew, to whom the purchaser stands *in loco parentis*. Lewin, p. 193. Y

(4-a) Presumption for advancement of child—Example.

(a) One Simon Dyer paid the purchase money for certain property and took the conveyance to himself, his wife Mary and a son William jointly. Simon survived his wife and then died, devising all his interest in these premises to the plaintiff, who filed his bill against the son William, insisting that, as the purchase money was all paid by Simon, —the son William—the defendant, was but a trustee, and it was held

1.—“*Transfer....by another*”—(Concluded).

that, though, if no relationship existed, there would be resulting trust in favour of the person paying the purchase money, yet the circumstance of the nominee being the child of the purchaser operated to rebut the resulting trust, and the defendant took the property beneficially as an advancement from his father. *Dyer v. Dyer*, 1 W. and J. 203; 2 Cox. 92. Z

Real purchaser—Payment—Parol evidence.

The real purchaser can give parol evidence to prove his payment of purchase money, though it be otherwise expressed in the deed. The resulting trust may be rebutted by parol. *Lewin*, p. 60. A

6) Onus of proof in such cases.

The—lies on the party, in whose name it was purchased, to prove that he was solely entitled to the legal and beneficial interest in such purchased estate. 6 M.I.A. 53; 13 M.I.A. 232. B

(7) Trust in such cases.

In India, as a general rule, the criterion as to ownership of property is the source from which the purchase money was supplied; but it is not the sole criterion, and it depends on the presence or absence of rebutting circumstances. 29 Bom. 306. C

(8) Law in Bombay.

According to the law as it prevails in Bombay, a purchase by a husband in his wife's name creates no presumption of a gift to her or of advancement for her benefit. (*Ibid.*) D

(9) Hindu widow.

Among Hindus, the grounds against assuming advancement are specially unfavourable to the claim of a widow to an absolute estate. (*Ibid.*) E

83. Where a trust is incapable of being executed ¹, or where

Trust incapable of execution, or executed without exhausting trust-property.

the trust is completely executed without exhausting the trust property ², the trustee, in the absence of a direction to the contrary ³, must hold the trust-property, or so much thereof as is un-

exhausted, for the benefit of the author of the trust or his legal representative ⁴.

Illustrations.

(a) A conveys certain land to B—

“upon trust,” and no trust is declared; or

“upon trust to be thereafter declared,” and no such declaration is ever made; or

upon trusts that are too vague to be executed; or

upon trusts that become incapable of taking effect; or

“in trust for C,” and C renounces his interest under the trust.

In each of these cases B holds the land for the benefit of A.

(b) A transfers Rs. 10,000 in the four per cents. to B in trust to pay the interest annually accruing due to C for her life. A dies. Then C dies. B holds the fund for the benefit of A's legal representative.

(c) A conveys land to B upon trust to sell it, and apply one moiety of the proceeds for certain charitable purposes, and the other for the maintenance of the worship of an idol. B sells the land, but the charitable purposes wholly fail, and the maintenance of the worship does not exhaust the second moiety of the proceeds. B holds the first moiety and the part unapplied of the second moiety for the benefit of A or his legal representative.

(d) A bequeaths Rs. 10,000 to B, to be laid out in buying land to be conveyed for purposes which either wholly or partially fail to take effect. B holds for the benefit of A's legal representative the undisposed of interest in the money or land if purchased.

(Notes).

1.—“Where a trust....executed.”

Such incapacity may be due to.

(a) VAGUENESS.

Where the trust is too vague to be executed, it results to the settlor or his legal representative. *Fowler v. Galske*, 1 R. and M. 232; *Morice v. Bishop of Durham*, 9 Ves. 399. **F**

(b) BEING VOID FOR UNLAWFULNESS.

Where a trust declared by settlor is unlawful, the trust, being void, results. *Carrick v. Emlington*, 2 Wms. 361, *Arnold v. Chapman*, 1 Ves. Sen. 108. **G**

(c) FAILING BY LAPSE OF TIME.

Where a trust fails by lapse of time, it results to settlor. *Williams v. Coade*, 10 Ves. 500, *Davenport v. Coltman*, 12 Sim 610. **H**

2.—“Where....without....exhausting trust property.”

1) Trusts for sale—Proceeds, undisposed of.

If real estate be devised upon trust to sell for a particular purpose, and that purpose does not exhaust the proceeds, the part that remains unapplied, whether the estate has been actually sold or not, will result to the testator's heir, and not to the executor. *Starkey v. Brookes*, 1 P. Wms. 390, *Wilson v. Mayor*, 11 Ves. 205. **I**

2) Unexhausted residue—Other cases.

(a) Where there was a devise to A upon trusts to pay debts, and there was something which remained after such payment, it was held that what remained resulted to settlor. *King v. Demson*, 1 V. and B. 279. **J**

(b) Where there is a devise upon trusts which do not exhaust the property devised, the mere conferring of a legacy or other benefit upon the heir does not prevent there being a resulting trust of the residue for him—unless there be other circumstances sufficiently strong to turn the scale in favour of the devisee. 2 Bom. 388 at p. 410. **K**

3) Exception under English law—Charities.

In the case of charities, under English law, where the rents from the estate increase, the surplus or unexhausted residue will be applied to like charitable purposes. *Attorney-General v. Cooper's Company*, 19 Ves. 187; *Attorney-General v. Wilson*, 3 M. and K. 362. **L**

2.—“Where... without... exhausting trust property”—(Concluded). *

(4) Declaration of trust invalid—Resulting trust

(a) Whether the resulting trust flows from the invalidity of the declared trust or from the impossibility of ascertaining the declared trust, it is equally a substituted trust that is, a trust which is created by the law *forte de mieux*, that is, as the best arrangement which the law regards is possible in difficult circumstances. 8 Bom.L.R. 928-81 B 222 M

(b) This general rule is affected to this extent only, that, where there is a trust covering the whole estate, and the bequests do not exhaust the whole estate, the trustees are express trustees of the residue, for the heir of the testator (*Ibid*) N

(5) Bequest with instructions—Instructions not carried out—Fraud—Resulting trust.

(a) If any individual, on his death bed or at any other time is persuaded by his heir at law, or his next of kin to abstain from making a will, or if the same individual, having made a will communicates the disposition to the person on the face of the will benefited by that disposition, but, at the same time says to that individual that he has a purpose to answer which he has not expressed in the will but which he relies on the donee to carry into effect, and the donee assents to it, either expressly or by any mode of action which, the donee knows must give the testator the impression and belief that he fully assents to the request then the heir at law in the one case and the donee in the other, will be converted into trustees, simply on the ground that an individual shall not be benefited by his own personal fraud 18 M.L.J. 158 O

(b) Where a legatee, with secret instructions to carry out some trust, claims as universal legatee, without disclosing the trust and suppressing the instructions given by the testator, with the evident intention of retaining the estate himself letters of administration cannot be granted to him, even on the view that he has some beneficial interest in the estate, as the same will only enable him to commit fraud (*Ibid*) P *

3.—“In the absence of a contrary.”

(1) Direction to contrary must be apparent

In order to exclude the legal representatives of the settlor his intention to exclude them must be apparent *Holliday v Hudson*, 3 Ves 210 (211), *Harrison v Harrison*, 2 H and M 237 Q

(2) Contrary direction—Cases.

(a) Where A by his will gave to his brother (his heir at law) £ 5, and made his wife his sole heiress and executrix of all his lands and other estate and to sell, etc., at her pleasure, it was held that there was no resulting trust to the heir of the real estate for A intended that his wife should take the same for her benefit *Rogers* 3 P.W. 193. R

(b) Where there was an assignment of property by a debtor, to trustees in trust to sell and divide the proceeds amongst the creditors, in rateable proportions according to the amounts of their respective debts, it was held that there was no resulting trust in favour of the debtor, in the event of there being more than sufficient to pay 20 shillings in the pound. *Smith v Cooke*, 1891 A.C. 207. S

4.—“The trustee must hold....for....legal representative.”

(1) Trust to whom results—English and Indian law.

In India the trust results to the author of the trust or his legal representatives.

In England, if the resulting trust arises under an instrument *inter vivos*, the beneficial interest results to the settlor himself. But where the trust is created by means of a will, the property results to the heir or devisee of the testator (if it be real estate) or to the residuary legatees (if it be personal estate), whether the will contains a direction for conversion or not. *Symes v. Hughes*, 9 Eq. 475; *Ackroyd v. Smithson* 1 W. T. 372. T

(2) A difficulty suggested.

In this and some of the succeeding sections, the Legislature provides that the trustee shall hold the property for the benefit of the author of the trust or his legal representatives. Suppose the author of the trust is dead leaving no heirs or representatives, no provision is made for such a case. In England, in such cases, it goes to the trustee, if he has the legal estate. In India, taking into consideration the provisions and the policy of the Act, the property would escheat to the Government as *ultimus haeres* of the author of the trust. See Powell, p. 324. U

84. Where the owner of property transfers it to another for an illegal purpose, and such purpose is not carried into execution¹, or the transferor is not as guilty as the transferee², or the effect of permitting the transferee to retain the property might be to defeat the provisions of any law³, the transferee must hold the property for the benefit of the transferor.

(Notes).

General.

1) Object of section.

This and the section next following deal with the transfers of property by non-testamentary and testamentary instruments respectively which are void as trusts, though the property has come into the hands of the transferee. Powell p 325, 2nd Ed. Y

2) Scope of section.

(a) It covers all cases of fraudulent transfers—transfers for objects which are prohibited by law, etc. W

(b) S 84, Trusts Act, sufficiently declares the law and policy to be enforced by Courts in India. 18 M.L.J. 152 = 31 M. 97 = 3 M.L.T. 246. X

1.—“Where the....illegal purpose....execution.”

1) Property settled with unlawful purpose.

(a) Where a trust is created for an unlawful purpose, the Court will neither enforce the trust in favour of the parties intended to be benefited, nor will assist the settlor to recover the estate unless the illegal purpose fails to take effect. *Cottingham v Fletcher*, 2 Atk. 155; 9 Bom. L.R. 542; 33 C. 967 = 10 C.L.J. 22 = 10 C.W.N. 650. See, also, 11 B. 708 and 8 C. 788. Y

1.—“Where the...illegal purpose....execution”—(Concluded).

- (b) The settlor may recover the property where the illegal purpose failed to take effect, so that no trust arose, and, the trustees having paid no consideration, the equitable interest resulted. *Symes v. Hughes*, 9 L.R. Eq. 475; *Manning v. Gill*, 13 L.R. Eq. 485. Z
- (c) A trust results where the trusts expressed are void for unlawfulness. *Car-
rick v. Errington*, 2 P. Wms. 361, *Arnold v. Chapman*, 1 Ves.
Sm. 108. A
- (d) Where the plaintiff, fearing that he will have to forfeit his property as a result of his conviction for an offence, transferred his properties to the defendant, and it turned out that he was not liable to be convicted, and so he sued to recover the same, it was held that there was no illegality in fact, but only in intention, and, since it was not carried out, the trust resulted. *Davis v. Otty*, 25 Beav. 208. B
- (e) Where a father conveyed his property to his daughter to avoid being called upon to serve as sheriff, but afterwards sued to recover it before actually taking the oath, held that, the purpose not having been carried out, the trust resulted. *Buch v. Balgare*, Amb 261 C
- (f) A plaintiff who is *in pari delicto* with the defendant, as parties to an unlawful agreement, is not entitled to any relief, even though the unlawful agreement has not been fully carried out, if there has been a part performance of a substantial character. 15 M.L.J. 478 = 29 M. 72, see, also, 4 N L R. 26 D
- (g) Partial, but yet a substantial, execution of an illegal purpose will be “carrying out into execution” of the illegal purpose, within the meaning of S. 84, Trusts Act. (*Ibid*) E
- (h) Where a person transfers property to another *benami* in order to defeat creditors, and the purpose is not carried out, the transferor is not estopped from relying upon the *benami* nature of the transaction, in a suit for specific performance of a contract to sell entered into by the transferee with a third person 18 M.L.J. 152 = 31 M. 97 = 3. M.L.T. 246. F

(2) Trust partly lawful and partly unlawful.

- (a) If property be given upon trust, to apply part thereof for an unlawful purpose, and to hold or apply the residue for a lawful purpose, then, if the amount intended to be applied for the unlawful purpose cannot be so far ascertained as to make it clear that there would be a residue applicable to the lawful purpose, the whole gift will fail. *Chapman v. Brown*, 6 Ves. 404, *Lumbrey v. Guir*, 6 Madd. 161. G
- (b) But the mere fact that the amount to be applied for the unlawful purpose has not been expressly stated in the gift will not make the whole gift void, and the Court will, if it be practicable, ascertain the amount which would have satisfied the unlawful purpose, and thus uphold the gift. *Mitford v. Reynolds*, 1 P.F. 185, *Fish v. Attorney-General*, L.R. 4 Eq. 521. H
- (c) And where the lawful purpose is charitable, the whole of the property is available for the lawful purpose. *Dawson v. Small*, L.R. 18 Eq. 114; *Hunter v. Bullock*, L.R. 14 Eq. 45. I

2.—“The transferor is not...transferee.”

(1) Transferor *in pari delicto* with defendant.(a) See 15 M.L.J. 478 = 29 M. 72, *supra*. J(b) When a person has intentionally vested certain property in another for an illegal purpose, the settlor cannot recover it, if the transferee shows that both are equally in the wrong. *In pari delicto potior est conditio defendentis*. *Ayerst v. Jenkins*, 16 Eq. 275, *Duke of Bedford v. Cokifenden*, 2 Ves. S. 116. K(c) But there will be a resulting trust, if the illegal purpose is not carried into execution. *Syme v. Hughes*, 9 Eq. 475. L(d) Where a father granted land to his son to give him a colorable qualification to shoot game under the English Game Law, and without any intention of conferring a beneficial interest upon him, it was held that the son and the father were *in pari delicto*, and so there could be no resulting trust. *Hurst v. Gresty*, 1900, 2 Ch. 541. M

3. - “Or the effect... defeat... law.”

(1) Scope of this clause.

Under this clause would fall cases where property is transferred so as to evade the rule against perpetuities, or against accumulation of income, or to evade the Mortmain Acts. In such cases there would be a resulting trust in favour of settlor. *Garick v. Errington*, 2 P W. 361. N

(2) Effectuation of unlawful object.

Where the effect of allowing the trustee to retain the property might be to effectuate an unlawful object, the trust results. *Reynel v. Sprye*, 1 De G. and M. and C. 660. O

(3) Trust for religious purposes—Invalidity—Recovery by heirs—Limitation.

Where an estate is given by will to trustees for religious and other purposes, some of which are invalid or fail, the heirs of the testator may be barred by limitation from recovering the portion undisposed of, though they might still bring a suit to compel them to properly administer the trusts which have not failed. 8 C. 788. P

85. Where a testator bequeaths certain property upon trust,

Bequest for illegal purpose.

and the purpose of the trust appears on the face of the will to be unlawful ¹, or during the testator's lifetime the legatee agrees with him to apply the property for an unlawful purpose, the legatee must hold the property for the benefit of the testator's legal representative.

Where property is bequeathed, and the revocation of the be-

Bequest of which revocation is prevented by coercion.

quest is prevented by coercion ², the legatee must hold the property for the benefit of the testator's legal representative

(Notes).

1.—“Unlawful.”

As to what trusts are lawful and what are unlawful, see S. 4, *supra*.

2.—“Coercion.”

(1) Coercion includes fear.

Coercion includes fear. It is not a vain fear, but a fear such as the fear of death or of bodily hurt, or of imprisonment, or of the loss of all or part of one's goods. Williams on Executors.

(2) Imaginary fears.

Imaginary fears may be sufficient to constitute coercion *Boyse v. Rossborough*, 6 H.L. Ca. 2.

86. Where property is transferred in pursuance of a contract

Transfer pursuant to rescindable contract.

which is liable to rescission, or induced by fraud

or mistake, the transferee must, on receiving

notice to that effect, hold the property for the

benefit of the transferor subject to re-payment by the latter of the consideration actually paid.

(Notes).

General.

(1) Scope of section

Ss. 86 to 94 deal with what are known to English Law as “constructive trusts.”

(2) General doctrine.

A constructive trust is raised by a Court of Equity wherever a person, clothed with a fiduciary character, gains some personal advantage by availing himself of his situation as trustee, for as it is impossible that a trustee should be allowed to make a profit by his office, it follows that, so soon as the advantage in question is shown to have been acquired through the medium of a trust, the trustee, however good a legal title he may have, will be decreed in equity to hold for the benefit of his *cestui que trust*. Lewin, p. 196.

(3) Meaning of constructive trusts.

(a) These are trusts which the Court elicits by a construction put upon certain acts of parties, as when a tenant for life of leaseholds renews the lease on his own account, in which case the law gives the benefit of the renewed lease to those who were interested in the old lease. Lewin, p. 120.

(b) Where, in order to satisfy the demands of justice and without any reference to the presumed intention of the parties, a Court of Equity raises a trust by construction, and from a consideration of what is right and just, it calls upon the person in possession of the property to hold it for the benefit of another. Lewin, p. 196.

(4) Trustee's agent not a constructive trustee.

An agent employed by a trustee is accountable in general to his principal only, and cannot, as a constructive trustee, be made responsible to the *cestui que trust*. *Keane v. Roberts*, 4 Madd. 382, *Davis v. Spurling*, 1 R. M. 54.

General—(Concluded).

(5) Instances of constructive trusts.

Constructive trusts also arise, where the trust estate is converted by the trustee from one species of property into another, and again where the trust estate passes from the trustee into the hands of a volunteer, whether with or without notice, or of a purchaser for valuable consideration with notice. Lewin, p. 210. Y

1.—“Property pursuant to contract.”

(1) Property obtained by fraud.

Where property is obtained by fraud, a Court of Equity construes a trust in favour of the transferor, because the transferee has not the equitable estate, though he has the legal one. The Court, in such cases, treats the person, who has obtained property by fraud, as a trustee for the party prejudiced by the fraud. *Booth v. Turle*, 16 Eq. 182; *Roche-fould*, 1897, 1 Ch. 196. Z

(2) Fraud must be proved.

The fraud must be proved by very clear evidence. Courts should not go on mere presumption. *Macarwick v. Griogon*, L.R. 4 H.L. 88. A

87. Where a debtor becomes the executor or other legal representative of his creditor, he must hold the debt for the benefit of the persons interested therein.

Debtor becoming creditor's representative.

88 Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect the interests of another person by availing himself of his character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person, and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.

Advantage gained by fiduciary.

Illustrations.

(a) A, an executor, buys at an undervalue from B, a legatee, his claim under the will. B is ignorant of the value of the bequest. A must hold for the benefit of B the difference between the price and value.

(b) A, a trustee, uses the trust-property for the purpose of his own business. A holds for the benefit of his beneficiary the profits arising for such user.

(c) A, a trustee, retires from his trust in consideration of his successor paying him a sum of money. A holds such money for the benefit of his beneficiary.

(d) A, a partner, buys land in his own name with funds belonging to the partnership. A holds such land for the benefit of the partnership.

(e) A, a partner, employed on behalf of himself and his co-partners in negotiating the terms of a lease, clandestinely stipulates with the lessor for payment to himself of a lakh of rupees. A holds the lakh for the benefit of the partnership.

(f) A and B are partners. A dies. B, instead of winding up the affairs of the partnership, retains all the assets in the business. B must account to A's legal representative for the profits arising from A's share of the capital.

(g) A, an agent employed to obtain a lease for B, obtains the lease for himself. A holds the lease for the benefit of B.

(h) A, a guardian, buys up for himself incumbrances on his ward B's estate at an undervalue. A holds for the benefit of B the incumbrances so bought, and can only charge him with what he has actually paid.

(Notes).

General.

(1) Scope of section.

Under this section would come all cases where a person standing in a fiduciary relationship with another benefits himself in respect of that position. In its aspect the position is very wide—it embraces all cases of dealing entered into by that person, under circumstances in which his own interests may be adverse to that of the beneficiary, and a benefit thereby accrues to that person. This section was held applicable to a mortgagee, who profits himself because of the advantage his position gives him over bidders who compete with him, in respect of his presumably superior knowledge of the mortgaged property, its value, etc.
23 M. 377. A1

(2) Principle of section.

A trustee is bound not to do anything which can place him in a position inconsistent with the interests of the trust, which could possibly interfere with his duty in discharging it. Neither he nor his representatives could be allowed to retain an advantage acquired in violation of these.
Hamilton v. Wright, 9 C. and F. 111, *Williams v. Stevens*, 36 L.J.P.C. 21. B

1.—“Advantage gained by fiduciary.”

(1) Advantage—Constructive trust

A constructive trust is raised by a Court of Equity, wherever a person clothed with a fiduciary character gains some personal advantage by availing himself of his situation as trustee. Lewin, p. 196. C

(2) Common instance thereof—Renewal of leases

(a) RENEWAL BY TRUSTEE.

A common instance of a constructive trust occurs in the case of renewal of leases, the rule being that, if a trustee, or executor, or even an executor *de son tort*, renew a lease in his own name, he will be deemed in equity to be trustee for those interested in the original term. *Griffin v. Griffin*, 1 Sch. and Lef. 354; *Mulvaney v. Dillon*, 1 B. and B. 409, see *Sandford v. Keech* (*Rumford Market case*). See Ch. Ca. 61; see, also, 6 C.W.N. 372. D

(b) RENEWAL BY TRUSTEE'S AGENT.

Neither can an agent or other person acting under the authority of a trustee, executor, or tenant for life, renew for his own benefit. *Edwards v. Lewis*, 3 Atk. 538. E

1.—“*Advantage gained by fiduciary*”—(Continued).

(c) SALE OF RIGHT OF RENEWAL.

If, instead of taking a renewal himself, the trustee, executor, or tenant for life, dispose of the right of renewal for a valuable consideration, the purchase money will be subjected in equity to the trusts of the settlement; for, if a person cannot appropriate the renewal to himself, the Court will not suffer him to sell for his own benefit. *Owen v. Williams*, Amb. 734. **F**

(d) LIEN FOR EXPENSES OF RENEWAL.

A trustee or executor, who has renewed a lease, has a lien upon the estate for the costs and expenses of renewal with interest. He will also be allowed for money subsequently laid out in lasting improvements. *Holt v. Holt*, 1 Ch. Ca. 190, *Rowley v. Gunner*, 2 Ch. 503. **G**

3) **Factor, Agent, etc.—Constructive trustees**

(a) The principle upon which a Court of Equity raises constructive trusts might be pursued into numerous other instances; as, if a factor, agent, partner, promoter of a company, or other confidential person, acquire any pecuniary advantage to himself through the medium of his fiduciary character, he is accountable, as a constructive trustee, for those profits, to his employer or other person whose interest he was bound to advance. *Fawcett v. Whitelouse*, 1 R. and M. 132, 9 Bom. L.R. 606; *Huckstein v. Barnes*, (1900) A.C. 240. **H**

(b) But until some judgment or decree has been obtained, the money cannot be said to be the money of the principal. *Lister and Co. v. Stubbs*, 45 Ch. D. (C.A.), 1, 13. **I**

4) **Mortgagee—Constructive trustee**

(a) ORDINARY MORTGAGEE.

(i) A mortgagee is not a constructive trustee for the mortgagor, of his power of sale, which is a power given to him for his own benefit, to enable him the better to realise his debt. *Warner v. Jacob*, 20 Ch. D. 220; *Tombin v. Luce*, 43 Ch. D. (C.A.) 191. See, also, 7 O.C. 307. **J**

(ii) But after he has exercised the power and paid himself his debt and costs, he is accountable as a trustee for the surplus proceeds of sale. *Charles v. Jones*, 35 Ch. D. 544, *Fleay v. Read*, 76 L.J.N.S. (C.A.) 39. **K**

(c) MORTGAGEE IN POSSESSION.

(i) On the other hand a mortgagee in possession is constructively a trustee of the rents and profits, and is bound to apply them in due course of administration. *Copprng v. Cooke*, 1 Vern. 270, *Maddocks v. Wren*, 2 Ch. Rep. 109. **L**

(ii) He is also liable as a trustee, even after transfer of the property to the mortgagor, for the rents and profits subsequently accrued, but the liability will not attach when the transfer is made by the direction of Court in a redemption action. *Hall v. Heward*, 32 Ch. D.C.A. 430. **M**

5) **Tenant-in-common—Constructive trustees.**

A tenant-in-common does not stand in a fiduciary relation to his co-tenant, so as to be a constructive trustee of any benefit acquired from an outstanding estate or incumbrance. *Kennedy v. De Trafford*, (1896) 1 Ch. 762; 1897 A.C. 180. **N**

I.—“ Advantage gained by fiduciary ”—(Continued).

(6) Trustee's agent—Constructive trustee.

- (a) An agent employed by a trustee is accountable in general to his principal only, and cannot, as a constructive trustee, be made responsible to the *cestui que trust*. *Keane v Roberts*, 4 Madd. 332; *Davies v Spurling*, 1 R. and M. 54. O
- (b) But this rule cannot apply where the agent has taken an actively fraudulent part, and so made himself a principal. *Hardy v Caley*, 33 Beav. 363, *Fyler v Fyler*, 3 Beav. 550; *Portlock v Gardner*, 1 Hare 606. P

(7) Directors.

- (a) Directors of a Company cannot buy the property thereof and then sell it for increased price. They must hold the profit, made by them out of such contracts, on behalf of the company. They cannot enter into any beneficial contracts with the company, and thus take undue advantage of their position as such. *Laxenburg R. W v Maynay*, 25 Beav. 586; *Aberdeen Ry. Co v Blake*, 7 Macq. 461. Q
- (b) They cannot deal with any part of the property or shares of the company for their advantage. *York Co v Hudson*, 13 Beav. 485. R
- (c) Where they obtained commission from purchases, on a sale by them of the property belonging to the company, it was held that such commission belongs to the company. *Gaskell v Chambers*, 26 Beav. 360. S

(8) Promoters

Similarly the promoters of a company are constructive trustees of secret profits. *Hatchens v Congreve*, 1 R. and M 150, *Emma Silver Mining Co. v. Grant*, 11 Ch. D. 918. T

(9) Gift to a solicitor by client.

(a) GENERAL.

- (i) In equity, a solicitor, as a general rule, should not, in any way whatever either personally or through his wife or through his son, in respect of any transaction in the relations between him and his client, make any gain to himself, at the expense of his client, beyond the amount of his fair professional remuneration. *Tyrell v. Bank of London*, 10 H. L. 26. U
- (ii) This disability extends even to a subsequent purchaser from the solicitor with notice of the transaction. *Cockburn v. Edwards*, 18 Ch. D 455.

(b) NATURE THEREOF.

- (i) In respect of a gift made by a client to his solicitor, there must be a complete absence of fraud, misrepresentation, or even suspicion, and there must also be a cessation of the confidential relation. *Morgan v. Munnett*, L.R. 6 Ch D. 638. W
- (ii) So where X, being aware that Y wished to get shares in a company, represented to Y that he (X) could procure a certain number of shares at £3 a share, and Y agreed to purchase at that price, and the shares were thereupon transferred in part to him and in part to his nominees, and he paid to X at £3 a share, and afterwards found that X was in fact the owner of the shares, having just bought them for £2 a share, held that, on the facts, X was an agent for Y, and X was ordered to pay back to Y the difference between the prices of the shares. *Kimber* v. *Barker* 1 D & Ch. App. 56. Y

1.—“**Advantage gained by fiduciary**”—(Continued).(c) **PRECAUTION IN SUCH CASES.**

Where a purchase is made by an attorney from his client, he must, to be on the safe side, insist on the intervention of another professional adviser.
Pisane v. Attorney-General for Gibraltar, L.R. 5 P.C. 516. **Y**

(d) **VALIDITY THEREOF.**

A solicitor cannot obtain a gift from his client while the relationship subsists.
Tomsen v. Judge, 3 Drew 306. **Z**

(e) **HOW THE COURTS VIEW IT.**

Where he, however, purchases from his client, the transaction is viewed with jealousy by the Courts. If the purchase is impugned, it is for the solicitor to prove that he gave full value for it, and that the client was really benefited by the transaction. *Spencer v. Topham*, 22 Beav. 573. **A**

(f) **EFFECT OF LAPSE OF TIME.**

Such gift is not set aside after a long lapse of time. *Nutt v. Easton*, (1899) 1 Ch. 873. **B**

(10) **Principal and agent.**

(a) Agents cannot secretly buy or sell the property which they are entrusted to sell or buy on behalf of the principal. Their dealing cannot be valid, except when there is the most entire good faith and a full disclosure. *Debusche v. At.*, 8 Ch D 286. **C**

(b) The fiduciary relationship arises when property is handed over to an agent for investment, sale, safe custody, etc., but not if he merely collects rents or debts on commission. Every agent is not a fiduciary. *Padoch v. Burt*, (1894) 1 Ch 343. **D**

(11) **Partner.**

(a) A partner would be deemed a constructive trustee, if he buys land in his name with partnership funds. *Feather Stonelaugh v. Frederick*, 7 Ves. 311. **E**

(b) So, if he is appointed to negotiate a transaction on behalf of the firm, and he receives secret commission, he is a constructive trustee. *Clements v. Hall*, 1 De G and J 173. **F**

(c) Where one of two co partners dies, and the other, instead of winding up the affairs of the partnership, retains all the assets in the business and makes profit thereby, he would be a constructive trustee. (*Ibid.*) **G**

(d) He is accountable, not merely for ordinary profits, but for all the advantages he has obtained in the course of the business; the right of the representatives of a deceased partner is confined only to demanding accounts. It would be barred by lapse of statutory period. They have no lien on the partnership estate. *Kindal v. Ward*, L.R. 6 Ex. 249. **H**

(e) A partner wrongfully selling partnership security is a trustee of the proceeds. *Kindal v. Ward*, L.R. 6 Ex. 248. **I**

(12) **Guardian and ward—Medical or spiritual advisers.**

(a) Every dealing of the guardian with the ward is viewed by the Courts with suspicion, and would be valid only when it appears that there was the fullest deliberation on the part of the ward, and the most abundant good faith on the part of the guardian. *Wright v. Vanderplank*, 2 K. and J. 1; **But** see, also, 6 O.C. 252. **J**

1.—“*Advantage gained by fiduciary*”—(Continued).

- (b) This principle applies to quasi-guardians, such as (1) Medical advisers. *Dent v. Benet*, 4 My. and C. 269, (2) Ministers of religion. *Huguenin v. Besely*, 14 Ves. 273. K, L

(12-a) **Husband and wife.**

But the above principle does not apply to cases of husband and wife. *Baro v. Willes*, (1899) 2 Ch. 578. M

(13) **Tenant for life.**

If a tenant for life accepts money in consideration of his allowing something to be done, which is prejudicial to the trust property, he holds the money so obtained for the benefit of those interested in the settlement. *Ple*, 2 Dr. and S 420. N

(14) **Purdanashin lady.**

Where two Mahomedan ladies executed a deed of gift to X standing in a fiduciary relationship to them, the Court, in setting aside the transaction, observed “It was for the plaintiff, who is seeking to bring their property to sale on the strength of a transaction with these two purdah women, to show that they were free agents in the matter and, having a clear knowledge of what they were doing, accorded their consent thereto. Courts of Equity deal with the subject upon the most enlightened principles, and watch with the most jealous care every attempt to deal with persons *non compos mentis*”

Wherever, from the nature of the transaction, there is not evidence of entire good faith, or the contract or other act is not seen to be just in itself, or for the benefit of these persons, Courts of Equity will set it aside, or make it subservient to their just rights and interests.” 8 A. 267; 15 I A. 81 (P.C.). O

(15) **Alleged agent of decree-holder—Purchase by—Constructive trust.**

Certain decree-holders were refused permission to purchase at the sale in execution, and, subsequently, the defendant, alleged by the decree-holders to be their agent, purchased the property, and got his name entered in the sale certificate. The decree-holder, hearing of the purchase, supplied the purchase-money, satisfied the purchase, and agreed to take a conveyance of the property after the sale was confirmed. On the refusal of the defendant to execute the conveyance, the decree-holders sued for a declaration that they were the real purchasers and for possession. It was held that the case would fall under S 317, C.P.C., and not under S 88 of the Indian Trusts Act, on the ground that there was no fiduciary relationship and no advantage obtained by the defendant by availing himself of that position. 22 A. 434; see, also, 2 I.A. 18 (P.C.). P

(16) **Partners and executors, liability of.**

- (a) Under S. 88, Trusts Act, a person, who occupies the position either of an executor or a partner, must hold, for the benefit of any person, whose interests he is bound to protect, every pecuniary advantage he has gained for himself in each of the following cases. (1) if he has gained the advantage by availing himself of either character, or (2) if he has gained the advantage by entering into any dealings, under circumstances in which his own interests are or ever may be adverse to those

1.—“ Advantage gained by fiduciary ”—(Concluded).

which he is bound to protect. Thus, in both cases one essential condition of liability is “ an advantage gained.” In the first, there must also be *unconscientious conduct*. In the second, that is not necessary, if there were a possibility of conflict between interest and duty. Under the section, there is no saving clause for cases of good faith. 9 Bom. L.R. 606. Q

- (b) The section taken by itself does not validate a purchase, by an executor, of the trust property, either on the ground of *bona fide* assent by his co-executor, or of good faith in the executor himself, who under the section could not retain an advantage, even though unconsciously obtained in the transaction, where his interest and duty were in conflict. (*Ibid.*) R

- (c) A surviving partner, being a person who holds the property by virtue of a contract, may buy the property in trade of his deceased co-partner, under proviso (b) to S. 95 of the Trusts Act; but inasmuch as his interests in the transaction may conflict with his duty, he is even then precluded by S. 88 from retaining for himself any advantage he may have acquired by the bargain. That is, he must give full value or what he could reasonably believe to be full value. There is no exception in favour of a co-executor or surviving partner, who transgresses those limits with the assent of a *bona fide* executor. 9 Bom. L.R. 606. S

- (d) It appears from ill. (f) to S. 88 of the Trusts Act, that the section demands from a surviving partner the same *uberrima fides*, as regards the interests of a deceased partner, as was due before death had dissolved the partnership, so far as the profits arising from the capital of the deceased are concerned. For these he must account to the legal representative, though, no doubt, when he has done so, there is nothing there to prevent him from receiving the assets in purchase or loan from such representative. But so long as he is under that liability to account, he is evidently within the meaning of the phrase which classes him with “ other persons bound in a fiduciary character to protect the interests of another.” (*Ibid.*) T

- (e) Under the Indian Trusts Act, surviving partners are not classed with trustees but they are subject to obligations in the nature of a trust, and are classed with persons bound in a fiduciary character to protect the interests of others, and the same duties, liabilities, and disabilities, so far as may be, attach to them as to trustees, subject to the provisos in S. 95 and the saving provisions of S. 96 of the Act. (*Ibid.*) U

(17) Confidential relation—Transactions—Points to be considered.

In respect of the validity or otherwise of transactions, between persons standing in a confidential relation to each other, the material point to be considered is, whether the person conferring a benefit on the other had competent and independent advice. Where a confidential relation is made out, the continuance thereof will be presumed by Court, unless there is distinct evidence of its determination. *Rhodes v. Bate*, 1 Ch. 252. Y

(18) Onus probandi—Constructive trusts.

See S. 111 of the Indian Evidence Act.

W

89. Where, by the exercise of undue influence¹, any advantage is gained in derogation of the interests of another, the person gaining such advantage without consideration, or with notice that such influence has been exercised, must hold the advantage for the benefit of the person whose interests have been so prejudiced.

Advantage gained by exercise of undue influence.

(Notes).

1.—“Undue influence.”

(1) Definition

See Contract Act, S. 16.

(2) What constitutes undue influence.

(a) PERSUASION, PRESSURE.

Persuasion is not unlawful, but pressure of whatever character, if exerted, so as to overpower the volition without convincing the judgment, will constitute undue influence, though no force is either used or threatened. *Hall v. Hall*, L.R. 1 P. and M. 481. Y

(b) NATURAL INFLUENCE.

(i) Natural influence exerted, by one who possesses it, to get a benefit for himself, is undue influence, so that gifts and contracts *inter vivos* between certain parties will be set aside, unless the party benefited can show affirmatively that the other party could have formed a free, unfettered judgment in the matter. *Pearl v. Lawless*, L.R. 2 P. and M. 462. Z

(ii) In order to obtain a will or a legacy, such natural influence may be exercised, for the rules of Courts of Equity in relation to gifts *inter vivos* do not apply to wills. (*Ibid*) A

(c) What amounts to undue influence depends a great deal upon the nature of the transaction and the relationship existing between the parties. *Hall v. Hall*, L.R. 1 P. and M. 481. B

(3) Confidential relation—*Onus probandi*.

(a) When a confidential relation is established between parties—such as physician and patient, confessor and penitent, the onus lies on the party benefited to show that there was no undue influence brought to bear on the testator. *Ashwell v. Long*, L.R. 2 P. and D. 477. C

(b) Where the plaintiff gifted away the whole of his property to his guru or spiritual adviser, the reason being his desire to secure benefits to his soul in the next world, and subsequently sued for cancellation of the instrument, held, setting aside the deed of gift, that, having regard to the fiduciary relation subsisting between the parties, the improvidence of the gift and the absurdity of the reason alleged therefor, the onus rested upon the defendant to show that the transaction was made without undue influence and in good faith. 12 A 523. D

1.—“Undue influence” —(Concluded).

(c) “What the Court in this country will do is to see that, where one person is so situated as to be under the control and influence of another, such other does not unduly and unfairly exercise that influence and control over such person for his own advantage or benefit, or for the advantage or benefit of some religious object in which he is interested, and will call upon him to give clear and cogent proof that the transaction complained of was such a one as the law would support and recognise.” 12 A 523. E

(d) Where a fiduciary or quasi-fiduciary relation had existed, Courts of Equity have always placed the burden of sustaining the transaction upon the party benefited by it, requiring him to show that it was of an unobjectionable character and one which it ought not to disturb. 10 A. 535. F

(4) Security obtained by Bankers of debt —Undue influence.

A son had forged his father's name and deposited the forged documents with certain bankers. The bankers, on discovery of the forgery, had put pressure on the father, without, however, distinctly threatening a prosecution, and in this way induced him to give a security for his son's debt. The security was declared to be invalid on the ground that the father was not a free and voluntary agent under the circumstances. *Williams v. Baley*, 1 R. 1 H.L. 200. G

90. Where a tenant for life, co-owner, mortgagee, or other qualified owner of any property, by availing himself of his position as such, gains an advantage in derogation of the rights of the other persons interested in the property, or where any such owner, as representing all persons interested in such property, gains any advantage, he must hold, for the benefit of all persons so interested, the advantage so gained, but subject to repayment by such persons of their due share of the expenses properly incurred, and to an indemnity by the same persons against liabilities properly contracted, in gaining such advantage.

Advantage gained
by qualified owner.

Illustrations.

(a) A, the tenant for life of lease-hold property, renews the lease in his own name, and for his own benefit. A holds the renewed lease for the benefit of all those interested in the old lease.

(b) A village belongs to a Hindu family. A, one of its members, pays *nazrana* to Government, and thereby procures his name to be entered as the *inamdar* of the village. A holds the village for the benefit of himself and the other members.

(c) A mortgages land to B, who enters into possession. B allows the Government revenue to fall into arrear with a view to the land being put up for sale, and his becoming himself the purchaser of it. The land is accordingly sold to B. Subject to the repayment of the amount due on the mortgage, and of his expenses properly incurred as mortgagee, B holds the land for the benefit of A.

(Notes).

I.—“ Advantage gained by qualified owner.”

(1) Tenant for life, co-owner, mortgagee.

Any advantage gained by—, in respect of the fiduciary relation, must be held in trust for the other persons interested. *Tanner v. Ekworthy*, 4 Beav. 487, *Re Lord Ranelagh's Will*, L R. 26 Ch.D. 590. **H**

(2) Tenant for life.

(a) RENEWAL OF LEASE.

(i) Where a tenant for life renews a lease in his own name, he should be held to be a constructive trustee of the new lease, when his position is such that he owes some duty to the other persons interested *Re Biss*, (1903) 2 Ch 40. **I**

(ii) This applies to a yearly tenant also, but not to a tenant-at-will or at sufferance *James v. Dean*, 11 Ves. 383 at p. 392, 15 Ves. 236. **J**

(b) WASTE.

(i) Where a tenant for life commits legal waste by felling timber, the tenant of the first estate of inheritance at the time can recover the trees or damages *Higginbotham v. Hawkins*, 11 R 7 Ch App 676, *Whitefield v. Bourd*, 2 P Wms. 210 **K**

(ii) If he commit equitable waste, the same rule applies, and the wrong-doer is responsible for the proceeds with interest, without being allowed for repairs *Lushington v. Boldere*, 15 Beav 1, *Honywood v. Honeywood*, L.R. 18 Eq 306 **L**

(iii) If the wrong-doer is himself the owner of the first estate of inheritance, he is constructively a trustee in equity of the proceeds of the timber, for the benefit of all the persons interested under the settlement, except himself, according to their respective estates. (*Ibid*) **M**

(c) PRODUCTION OF TITLE DEEDS

Where a settlement is in the custody of a tenant for life, who takes only a partial benefit, he is deemed to be a trustee for others claiming under it, and is bound to produce it at their request. *Banbury v. Briscoe*, 2 Ch Ca 42, *Darves v. Dysart*, 20 Beav 405. **N**

(3) Mortgagee in possession.

If a mortgagee is in possession, and if, owing to default in payment of revenue thereon, the estate is sold and he purchase it he is a constructive trustee thereof for the original mortgagor *Coppering v. Cooke*, 1 Ves. 270, but see 7 O C 307. **O**

(4) Co-owner making improvements

Where a co-owner, acting in good faith, permanently benefits an estate by repair or improvements, a trust would arise in his favour in respect of the sum spent by him in such improvements. *Leslie v. French*, 3 Ch D, 552. **P**

(5) Persons in lawful possession

(a) Where a person lawfully in possession makes permanent improvements, and the true owner comes and claims the property, he will be deemed a constructive trustee for the improvements made by the other, and will have to compensate him *Leslie v. French*, 2 and 3 Ch. D. 552; *Neeson v. Clarkson*, 4 Hare. 27. **Q**

1.—“Advantage gained by qualified owner” —(Concluded).

- (b) But the expenditure must have been a necessary and beneficial and proper one. *Lawledge v. Tyndall*, (1896) 1 Ch. 423. R

(6) Equity of redemption —Purchase of, by one co-sharer—Constructive trust.

Where one of several co-parcener share-holders defaulted to pay Government revenue due on the land, and where a purchaser of the equity of redemption from another co-parcener share-holder buys the lands in the sale held by Government to recover arrears of revenue, he cannot be said to have availed himself of his position as a qualified owner of land to gain an advantage in derogation of the rights of other persons interested in the property, so as to constitute him a constructive trustee under this section. 30 M 67 S

91. Where a person acquires property with notice that another person has entered into an existing contract affecting that property, of which specific performance could be enforced, the former must hold the property for the benefit of the latter to the extent necessary to give effect to the contract.

Property acquired with notice of existing contract¹.

(Notes).

1.—“Property....contract”

(1) Benamidar obtaining a mortgage decree.

A mortgaged land to B either as agent or benamidar for C; B sued on the mortgage and obtained decree. C sued A and B for a declaration that he was entitled to the benefit of the decree and had the right to execute it. It was *held* that C was entitled to the declaration, for, if A was a benamidar, he would be a constructive trustee, and if he were a mere agent, C would be entitled to the benefit gained by A in securing a decree upon the bond. 21 M. 353. T

(2) Contract of sale —Possession—Subsequent attachment by a third party.

Under a contract of sale with respect to certain fields, possession was delivered to the vendor and the whole of purchase-money was paid to the vendor, but the transfer was not effected, as the registered conveyance was not executed. Subsequently a judgment-creditor of the vendor sought for a declaration that the lands were liable to be attached and sold as the property of judgment-debtor, *held* that the judgment-debtor was nothing more than a bare trustee, and had no attachable interest in the property. 24 B. 400. U

(3) Contract for sale—Subsequent sale to one having knowledge thereof.

The plaintiff had obtained a registered sale-deed, comprising the property in question, from defendants, who had already to the plaintiff's knowledge contracted to sell it to another, and the plaintiff had paid no consideration for the sale-deed which was a collusive transaction; *held* that the plaintiff cannot recover, since he got the sale-deed, with the knowledge of the prior contract, and as such he was not a *bona fide* purchaser for value without notice. 18 M. 43. Y

1.—“Property....contract”—(Concluded).

(4) Agreement to sell land to A—Subsequent sale of same land to B—Applicability of the section.

Where X, the owner of a certain property, enters into a contract with A for sale of the land to him, and subsequently sells the same to B who has notice of the prior existing contract, *held* that B should hold the property for the benefit of A, to the extent necessary to give effect to the contract. 26 B. 159. **W**

(5) Mortgagee with knowledge of facts revealing existence of an equitable right

Where a mortgagee, at the time of his mortgage, is aware of circumstances which ought to have put him on enquiry, and such enquiry, if made, would have revealed the existence of an agreement by the mortgagor to mortgage the property to a third party, the mortgagee's right will, on the principles embodied in S 40 of the Transfer of Property Act and S. 91 of the Trusts Act, be postponed to the rights of such third party. 29 M. 177. **X**

92. Where a person contracts to buy property to be held on trust for certain beneficiaries, and buys the property accordingly, he must hold the property for their benefit to the extent necessary to give effect to the contract.

- Purchase by person contracting to buy property to be held on trust.

93. Where creditors compound the debts due to them, and one of such creditors, by a secret arrangement with the debtor, gains an undue advantage over his co-creditors, he must hold, for the benefit of such creditors, the advantage so gained.

Advantage secretly gained by one of several compounding creditors 1.

(Notes).

1.—“Advantage....creditors.”

Secret arrangement by creditor.

When a debtor compounds with his creditors, all are equally entitled *pro rata* to the property of the debtor. The equitable estate becomes vested in all the creditors. One creditor cannot get an advantage over the other by any secret arrangement with the debtor if he does so profit himself, he is a constructive trustee for the advantage secretly obtained. *Atkinson v. Denby*, 6 H. and N. 778 **Y**

94. In any case not coming within the scope of any of the preceding sections, where there is no trust, but the person having possession of property has not the whole beneficial interest therein¹, he must hold the property for the benefit of the persons having such interest, or the residue thereof (as the case may be), to the extent necessary to satisfy their just demands.

Constructive trusts in cases not expressly provided for.

Illustrations.

(a) A, an executor, distributes the assets of his testator B to the legatees without having paid the whole of B's debts. The legatees hold for the benefit of B's creditors, to the extent necessary to satisfy their just demands, the assets so distributed.

(b) A by mistake assumes the character of a trustee for B, and, under colour of the trust, receives certain moneys. B may compel him to account for such moneys.

(c) A makes a gift of a lakh of rupees to B, reserving to himself, with B's assent, power to revoke at pleasure the gift as to Rs. 10 000. The gift is void as to Rs. 10,000, and B holds that sum for the benefit of A.

(Notes).**General.****Scope of section**

The section is general and covers those cases where the legal and equitable interests are not united in the same person. It provides for cases not coming within the scope of the preceding sections, and is intended to cover that form of constructive trust, which the Punjab Court have held to arise when a co-sharer in a village community absents himself without expressly abandoning his rights. See Powell, p. 343. **Z**

1.—“The person...beneficial interest therein.”**(1) Vendor's lien****(a) WHEN IT ARISES.**

When A sells his land to B, the legal estate passes from A if the purchase money is not paid, the equitable interest does not pass, and the vendee is to that extent a constructive trustee for the vendor for the unpaid purchase money. *Morris v. Chambers*, 29 Beav. 246, *Frigh*, 13 Ch D. 628. **A**

(b) ENFORCEMENT THEREOF

(i) The vendor could enforce his trust against every one except a bona fide purchaser for value, who has acquired the legal estate in the property without notice of the purchase-money being unpaid. (*Ibid.*) *Macreth v. Symonds*, 1 W. 330. **B**

(ii) According to the legal maxim “Where equities are equal, the law prevails,” the lien fails, if the person in possession is a purchaser in good faith without notice for valuable consideration. *Kater v. Prembroke*. 1 B. and C 302. **C**

(c) LIEN—WHEN LOST.

This lien is lost by waiver, efflux of time, laches or abandonment. *Rice v. Rice*, 2 Drew 73, *Buckland v. Pockwell*, 13 Sim 412. **D**

(2) Vendee's lien.

Similar principles apply to a vendee's lien. *Torrance v. Bolton*, 14 Eq. 124. **E**

95. The person holding property in accordance with any of the

Obligor's duties,
liabilities, and dis-
abilities.

preceding sections of this chapter must, so far as may be, perform the same duties, and is subject, so far as may be, to the same liabilities and disabilities as if he were a trustee of the property for the person for whose benefit he holds it :

Provided that (a), where he rightfully cultivates the property, or employs it in trade or business, he is entitled to reasonable remuneration for his trouble, skill, and loss of time in such cultivation or employment; and (b) where he holds the property by virtue of a contract with the person for whose benefit he holds it, or with any one through whom such person claims, he may, without the permission of the Court, buy, or become lessee or mortgagee of, the property or any part thereof.

(Note).

Scope of section.

This section renders all the provisions of the Act as to duties, liabilities, and disabilities of express trustees, applicable to trustees under implied or constructive trusts. F

Nothing contained in this chapter shall impair the rights of transferees in good faith for consideration ¹, or create an obligation in evasion of any law for the time being in force ².
 Saving of rights of bond-fide purchasers.

(Notes).

1.—“ Nothing . . . consideration.”

Volunteers and purchasers with notice.

The *cestui que trust* may pursue his remedy against volunteers and purchasers with notice of the trust, they being not transferees in good faith. *Bowles v. Stewart*, 1 Sch. and Lef. 226; *Walley v. Walley*, 1 Vern. 484. But see 5 A. 608 and 6 A. 24. G

2.—“ Or create . . . force.”

Legislature—Evasion.

No implied or constructive trust would arise, if the effect of so raising a trust would be to defeat the policy of an Act of the Legislature. *Cottin-gham v. Fletcher*, 2 Atk. 150. H

THE SCHEDULE.**STATUTE.**

Year and chapter.	Short title.	Extent of repeal.
29 Car. II., c. 3	The Statute of Frauds.	Sections 7, 8, 9, 10 and 11.

ACTS OF THE GOVERNOR-GENERAL IN COUNCIL.

Number and year.	Short title.	Extent of repeal.
XXVIII of 1866	The Trustees' and Mortgagees' Powers Act, 1866	Sections 2, 3, 4, 5, 32, 33, 34, 35, 36 and 37. In sections 39* and 43 the word "trustee" wherever it occurs; and in section 43 the words "management or" and "the trust-property or."
I of 1877	The Specific Relief Act, 1877.	In section 12 the first illustration.

* In the schedule the figures 39 have been repealed by Act XII of 1891, Sch. I.; but the two words between which the figures 39 stand are allowed to stand as they are.

INDEX.

Note 1.—The thick figures at the end of each line refer to the pages of this volume and the alphabets in italics preceding the thick figures refer to the cases having corresponding thick letters against them in those pages.

2.—S in Brevier Roman denotes the section.

A

Account, should be kept by trustee, S. 19, pp. 114—116. S. 19, explained, *D*, 114.

Principle of S. 19 applied to agents, executors and receivers, *C*, 114.

Accounts, of trustee, settlement of—Effect of such settlement, *R*, 180.

Settlement of—of trustee. Nothing due to beneficiary: Trustee's right, *T—H*, 180—182.

Settlement of, of trustee: Trustee not entitled to release, *W*, 181.

Right to inspect, and take copies of instrument of trust, etc., S. 57, pp. 253—25.

When does right to inspect, come into existence, *T—V*, 253, 254.

Inspection of directly or through solicitors, *W*, 254.

Trustee to keep himself ready with, *X, Y*, 254.

Right of legatees to inspect, etc., *Z, A, B*, 254.

Acquiescence—of beneficiary' a bar to relief Direct, *T, U*, 284.

Indirect, a bar to relief, *V, W*, 284.

Definition of, *X*, 284.

Acquisition, by trustee of trust property wrongfully converted, S. 65, p. 292.

Act X of 1865.

S. 105—Religious or charitable purposes, p. 8.

Act X of 1897 (General clauses) Definition in, of the term "registered," *J, K*, 17.

Administration, Decree in—Suit: effect of, on executor's duties, S. 186.

Action: Execution of repairs by trustee after: *P*, 225.

Order for general—Action when given, *X, Y*, 225.

Costs of—Action, *Z, A*, 226.

When—Action necessary, *B, C*, 226.

Administrator, payment of time-barred debts by, *A—D*, 215.

may allow time for payment of debt, *E*, 215.

Advancement, trustee's power to make, *G—J*, 193—194.

Advantage, of breach gained by *cestui que trust*—His liability to trustee, *P—R*, 173.

Advocate-General, Degree in which, should interfere in administration of public charities, *I*, 10.

Alien, Whether can be beneficiary, *E, F*, 64.

Alienation, with or without intervention of trustee, *F*, 257.

Restriction against, *J*, 257.

Aliens, Position of, B, 59.

Appeal, Order under S. 55, A, 246.

Order refusing to remove trustee, not appealable, *N* and *O*, 267.

Order dismissing application for removal of trustee, not appealable; *I*, 320.

Application, for directions by trustees: Questions of detail and difficulty, C 178.

by trustee under S. 34, costs of. *M, N*, 179—by trustee under S. 34: general rule as to how costs are charged, *M*, 179.

Assignee, Right of beneficiary's to sue trustee directly, G, H, 257.

Liable to equities arising from actual payments, *A*, 258.

Taking subject to all equities *S—W*, 258.

Bound by state of accounts at time of assignment, *Y*, 258.

Trustee indebted to trust—bound by debt, *Z*, 258.

Liabilities of, to equities subsequently attaching, *B*, 259.

Set-off as affecting, *T*, 259.

Assignment, in favour of creditors, U—W, 80, whether in such cases, resulting trust of surplus arises in favour of assignors, X, 80.

Perfect only after notice given to trustee or debtor, *R*, 101.

Effect of not giving notice, *S*, 101.

Assignability of equitable interest—General rule, *D*, 257.

By married woman under coverture, *K*, 257.

Assignor's, assignee one of trustees—Effect, T, U, 260.

Attachment, of trust property by creditors—Circumstances under which creditors could claim right of indemnity, L, 171.

of property into which trust estate has been converted, *I, J*, 265.

“*Attendant circumstances*,” in S. 81, Construction of, *U, V*, 329.

Attorney, Payment to, to be recouped, B, 237.

Author of trust, defined, S. 3, p. 12.

B

Banker and agents, Moneys of constituents ordered to be invested, mixed with their own, before insolvency, Q, 295.

Bankrupt, Power of, to create trust, Q, 59.

Bankruptcy, Recent, necessary for removal of trustee, G, 309.

“*Bare trusts*”, Right of purchase, *I*, 272.

Benamidar, obtaining a mortgage decree, T, 350.

Benami transaction, Property brought by father in son's name, V, 332.

Purchase in name of stranger, *W*, 332.

Purchase in name of child or wife, *X*, 332.

English Law—Extension of principle, *Y*, 332.

Real purchaser—Payment—Parol evidence, *A*, 333.

Onus of proof in such cases, *B*, 333.

Trusts in such cases, *C*, 333.

Beneficial interest, What is, S. 3, p. 12.

Right to transfer, S. 58, pp. 256—261.

Of married woman can be impounded, *L*, 300.

Beneficial Interest—(Concluded).

Where it does not appear that transferor intended to dispose of, S. 81, pp. 327—331.

Scope of S. 81, O, 328.

General rule, P, 328.

Other rules, W—Z, A, 330.

Donor's intention—Donee not to take beneficially, R, S, 8.

Disposal of, meaning of, T, 328.

Beneficiaries, Who are, Y, 77.

Interest of, Z, 78.

Improvident, not entitled to payment, A, 78.

Opinion of majority of, prevails, B, 78.

Cases where Court can consent for, D—I, 78.

Several—Trustee to be impartial, G, H, 196.

Beneficiary, See breach of trust.

defined, S. 3, p. 12.

Disclaimer by, S. 9, pp. 63—65.

Who may be, S. 9, pp. 63 - 65.

Who may be—English Law, A, 64.

Crown, whether can be, B, 64.

Corporation, whether can be, C, D, 64.

Alien, whether can be, E, F, 64.

Married woman, whether can be, G, 64.

Dogs, horses, etc., whether can be, H—I, 64.

Trustee not to set up title adverse to, S. 14, pp. 91—93.

Conveyance of trust property to, after trust determines, C, 124.

becoming *sui juris*—whether trust for sale determines, D, 124.

No relief, to an infant or *feme covert* fraudulently inducing trustee to commit breach, U—W, 138.

Concurrence of, will condone breach, X, Y, 138, 139.

Much more when beneficiary is himself trustee, Z, 139.

Legal capacity essential for valid concurrence, A, 139.

Consenting party must have means of knowing act to be breach, B, 139.

Court to enquire into fact and time of knowledge, C, 139.

Consideration to be kept in view in enquiry, D, 139.

Effect of undue influence or coercion, E, 139.

Acquiescing in breach, precluded from questioning it, F, G, 140.

Standing by without objecting will also preclude them, M, 140.

Acquiescence, meaning of, I—K, 140.

Direct and indirect, L, M, 140.

when will amount to admission, N, O, 140.

Scope of doctrine of, P, 140.

Acquiescence, mere delay to assert right, not, Q, 141.

Omission to make enquiries not, R, 141.

Beneficiary—(Continued).

- Subsequent, will estop, *W*, 141.
- in part breaches, *X*, 141.
- when no bar to suit, *Y*, 141.
- Length of time evidence of, *Z*, 141.
- Burden of proving facts not constituting, *A*, 142.
- Acquiescence, whether or not a question of fact, *B*, *C*, 142.
- Release and confirmation may also deprive, of right to relief against breach *D*, 142.
- But release of void transaction is of no effect, *E*, *F*, 142.
- Effect of releasing principal, *G*, 142.
- Waiver, meaning and effect of, *H*, 142.
- Delay,—when it will bar a suit, by, *I—K*, 142, 143.
- Overpayment to, *M*, 172.
- merely instigating breach, if liable, *O*, 173.
- Committing breach also a trustee—Liability to indemnity, *T* and *S*, 173.
- Partial beneficiary joining in breach—His liability, *U*, 173.
- What should be proved to make—Liable, *V*, 174.
- Liability of, for breach by him—His complicity, nature of, *W*, *X*, 174.
- Breach by—Trustee's right to impound beneficial interest, extent of, *Y*, *Z*, 174.
- Support of—by trustee, acts necessary for, *X*, *Y*, 192.
- Right to rents and profits, *S*. 55, pp. 245, 246.
- Interest of, *P*, 245.
- Rights and liabilities of, *Ss*. 55—69, pp. 245—302.
- 's right to transfer of possession, *S*. 56 pp. 246—253.
- 's right to specific execution, *S*. 56, pp. 246—253, *E*,—*H*, 246.
- Trustee and beneficiary, rights of, *Z*, 246.
- Conversion of special trust into simple trust, *J*, 246.
- One of several beneficiaries can, compel sale, *K*, 246.
- One of several beneficiaries cannot prevent sale, *L*, *M*, 246.
- Right of beneficiaries in respect of legacies, *O*, 148.
- Agreement by, not to interfere with trust, effect of, *R*, 246.
- Extent and nature of estate to be conveyed, *T*, *W*, 246.
- 's right to possession from trustee, *B*, *C*, 249.
- Right of, to accurate information, *Y*, *Z*, 249.
- Improvident beneficiaries not disentitled to payment, *K*, 250.
- To make out exclusive right to possession, *N*, 250.
- Possession in case of several beneficiaries—Discretion of Court, *O*, 250.
- Not estopped by taking portion of relief, *V*, 251.
- Money given to, ~~benefit~~ out in land to be conveyed or land to be sold, and proceeds paid to *A*,—Election, *W*, 251.
- Opinion of majority of beneficiaries prevails, *D*, 252.
- Suit by two out of 11 beneficiaries—Maintainability, *F*, 252.
- Right of, to inspect and take copies, *Q*, *R*, 252—Expense of copy not to be charged.

INDEX.

Beneficiary—(Continued).

- on trust funds, *S*, 253, when does right to inspect come into existence, *T—V*, 253, 254.
- 's right to inspect and take copies of Instruments of trust, accounts, etc., *S*, 57, pp. 253—256.
- 's right to transfer beneficial interest, *S*, 58, pp. 256—261.
- 's right to sue for execution of trust, *S*, 59, pp. 262, 263.
- 's right to proper trustees, *S*, 60, pp. 264—267.—Principle of *Ss*. 60 and 61, *G*, *II*, 264.
- Trustee dying after acting—Right to new trustees, *J*, 265.
- in remainder, right of, *K*, 265.
- 's right to compel trustee to any act of duty, *S*, 61, pp. 267—270.—Principle of *S*, 61, *P—R*, 268.
- 's right to damages from trustee—Jurisdiction of Court, *S*, 268.
- 's right to compel collection of outstanding, *T*, 268.
- 's right to compel suit against trespassers, *U*, 268.
- Suit against trespassers, *Y*, 268.
- Securing contingent interest—Possibility on possibility, *A*, *B*, 269.
- 's right to obtain injunction against trustee, *C*, 269.
- Injunction when will be granted, *D*, 269.
- Act—irremediable—Right to injunction, 269.
- Damage not being irreparable, *F*, 269.
- Injunction in favour of beneficiary partially interested, *G*, 269.
- Injunction against insolvent trustee—Poverty or bad character of executor—Effect, *H—L*, 269, 270.
- Wrongful purchase by trustee—Right of beneficiary, *S*, 62, pp. 270—280.
- Setting aside sale—Right of, to recover specific estate, *S*, 273.
- Equitable relief to—Effect of laches, *F*, 275.
- Setting aside sale—Liability of, to repay purchase-money, *Z*, 277.
- Reconveyance to—Right of lessees and *bona fide* transactions protected, *R*, 278.
- Confirmation by—Subsequent amendment, if allowed, *T*, *U*, 279.
- Breach of Trust—Condoning by, estops, *F*, 280.
- Following trust property—into the hands of third persons; into that into which it has been converted, *S*, 63, pp. 280—289.
- Following the estate into the hands of volunteer, *G*, *II*, 280.
- Purchase of the estate with notice—Liability of purchaser, *I—K*, 280, 281.
- Purchase of estate without notice, if valid, *J*, 281.
- Payment of trust money into bank—Bank's liability—Beneficiary's right to follow *M—O*, 281.
- Stolen property—Right to follow, *P*, 281.
- Right to follow trust property—General rule, *T*, *U*, 282.
- Right to follow trust property—Ground of rule, *V*, 282.
- Right to follow trust property—Trustee in bankruptcy, *W*, 282.
- Right to follow chattels, when lost—English law, *K*, 286.
- Following trust property, nature of evidence for, *L*, 286.

Beneficiary—(Continued).

Right to follow after order to pay into Court, *M*, 286.

Illegal trust—Right to follow, if applicable, *N*, 286.

Purchase of property with trust funds—Election of, *O*, *P*, 288.

No evidence to follow trust fund—Presumption of purchase under trust, when raised, *Q*, 286.

Absence of resources with trustees to make purchase, *R*, 286.

Nature of right to follow land, *S*, 286.

Money, notes, etc.—Right to follow, when lost, *X*, *Y*, *Z*—*A*.

Trust money mixed with trustee's money—Right to follow, *B*, *C*, 287.

Money—Right to follow, *F*, *G*, 288.

In hands of Executor, *H*, 288.

In what case right to follow ceases, *T*, *U*, 287.

Invalid trust—Right to recover trust property—Limitation, *W*, 287.

Confusion of trust stock with trustee's own stock—Right of, to follow, *N* 289

Trustee of two funds—Breach of trust *in one*—Repairing at expense of another—Right of, to follow, *O*, 289.

Charitable trusts—Blending of trust funds by trustee—Right to follow, *P*, 289.

Following money lent for special purpose, *Q*, 289.

Breach of trust by trustee—Legal representative liable to the extent of assets, *R*, 289.

Right of beneficiary, as against legatee, *S*, 289.

Defaulting trustee cannot claim as against, *R*, 292.

Right of, in the cases of blended property, *S*, 66, pp. 292–295; basis of *S*, 66, *S*, 292.

If can take land itself, or has only lien, *H*, *I*, 294.

Money followed through bank, *K*–*P*, pp. 294, 295.

Trust funds intermixed and dealt with as common funds—Apportionment of profits, *R*, 295.

Seeking to enforce lien, *onus* on, *V*, 295.

Liability of, jointly in a breach of trust, *S*, 68, pp. 297–300.

One of several beneficiaries joining in a breach of trust, *I*, *J*, 298.

Rule adopted by Court in such cases, *K*, 298.

Any equitable interest of, impoundable, *K*, 298.

Legal estate of, not impoundable, *O*, 299.

in default under covenant in trust instrument, *Q*, *R*, 299.

Co-trustee being also a, *S*, *T*, 299.

Impounding of interest indebted to trust estate, *U*, 299.

Lien to impound Beneficiary's interest, priority of, *V*, 299.

Interest of, against whom to be applied, *W*—*Z*, *A*, *B*, 299, 300.

Right to impound Beneficiary's against, transferee—Beneficiary's concurrence in breach of trust, *D*, *E*, 300.

Concurrence in breach of trust essentials for, *F*, 300

Acquiescence of, *G*, 300.

Beneficiary—(Concluded).

Rights and liabilities of Beneficiary 's transferee, S. 69, p. 301.

——'s right to transfer, N, 301.

Equities of, enforceable against his assignee, O, P, 301.

Debtor to trust-estate, R, S, 301.

Assignor not acquiring fiduciary position until after assignment, V, 301.

Set off affecting assignee from, W, 301.

——'s power to remove and appoint trustee, to be exercised reasonably, F, 302.

Bequest, to idol, Z, 36.

Of which vocation is prevented by coercion, S. 83, pp. 338, 339.

For illegal purpose, S. 85, pp. 338, 339.

Bona-fide purchasers, Saving of rights of, S. 96, p. 353.

Breach of trust, what is, S. 3, p. 12.

Liability for, S. 23, pp. 127, 148.

Either active or passive, M, 129.

Active breach, N—P, 129.

Passive breach, Q, 129.

Example of passive breach, R, U, 130.

Trustee liable for, V, 130

Trustee liable, even if no consideration, W, 130.

Immaterial if trustee gain no benefit by breach, X, Y, 130.

Paying legatee before testator's debts is, B, 130.

Fraudulent inducement by trustee, A, 130.

Criminal of, C, 131.

Court will never pass an order construable as approving, however beneficial to trust, X, 133.

Pleadings—Wilful default, D, E, 133.

Court will not adjudicate on breach without having all parties before it—joinder of parties, F, N, 133, 134.

Third persons acting as trustee no less liable for breach, O, 135.

Professional man wilfully advising breach, R, 135.

Condition of liability for breach of professional man, S, 135

Breaches by trustee of charities, W, 135.

No relief, to infant or *feme covert* fraudulently inducing trustee, to commit breach, U, W, 138.

Concurrence of beneficiaries will condone, X, Y, 138, 139.

Much more when beneficiary is himself trustee, Z, 139.

Legal capacity essential, for valid concurrence, A, 139.

Consenting party must have means of knowing act to be breach, B, 139.

Court to enquire into fact and time of knowledge of—Knowledge of beneficiary, C, 139.

Consideration to be kept in view of enquiry, D, 139.

Effect of undue influence and coercion, E, 139.

Beneficiaries acquiescing in breach, precluded from questioning it, F, G, 130.

Breach of trust—(Concluded).

Beneficiaries standing by without objecting will also preclude them, *H*, 140.

Acquiescence, meaning of, *I*, *X*, 140.

of two kinds, direct and indirect, *L*, *M*, 140.

Acquiescence, when will amount to admission, *N*, *O*, 140.

Scope of doctrine of, p. 140.

mere delay to assert right not, *Q*, 141.

Omission to make enquiry's not, *R*, 141.

Accepting portion of claim before suit, no, *S*, 141.

Acquiescence, whether reversioner not asserting title before interest comes into possession acquiesces, *T*, *V*, 141.

Subsequent, will estop, *W*, 141.

• in past breaches, *X*, 142.

Length of time, evidence of, *Z*, 141.

Acquiescence, burden of proving facts constituting, *A*, 142.

Acquiescence, whether or not question of fact, *B*, 142.

Acquiescence, essentials of valid, *L*, *Y*, 143, 144.

Honest, Interest awarded—Liability based on actual amount of loss, *A*, *M*, pp. 144, 145.

Honest, but compound interest awarded, *Q*, *R*, 146.

Dishonest, Compound interest, *S*, 146.

Further safeguards against, *A*, *H*, 147, 148.

Maxims established by Chancery Courts to maintain trust against trustee's wrongful acts, *A*, *H*, 147, 148.

Liability for, by predecessor or co-trustee, *Q*, 148.

Liability of, beneficiary joining in a breach of trust, *S*, 68, pp. 297—300.

One of several beneficiaries joining in a, *I*, *J*, 298.

Rule adopted in such cases, *K*, 298.

Estate legally vested in wrong doer also available, *M*, *N*, 299.

*Femes covert*s, and infants cannot concur in, *J*, *K*, 300.

Burden of proof, as to intention of settlor, *T*, 107.

Sale by trustee directed to sell within specified time, *S*, 22, pp. 122—127.

Burden of proving that beneficiary's interest not prejudiced by delay, *Z*, 126

C

Capricious trust, Validity, *K*, 65.

Cestui que trust, Whether can be, trustee, *G*, *H*, 67.

Case where no, exists to claim property, *B—D*, 92.

Arrangement between trustee and, *E*, 93.

Right of, to inspect accounts, *R*, 116.

Right of, to inspect documents—and to get copies of documents, *O—Q*, 161, 162.

Right of to inspect and take copies of documents, when arises, *R*, 162.

Acknowledgment of settlement of all demands by—Reason, *T*, *U*, 180.

Contracting conditionally to sell, subsequent assent of trustee, *Z*, 197.

If party to receipt given by trustee, *C—E*, 198.

Contract for allowance with, *I*, 235.

INDEX.

Cestui que trust—(Concluded).

How Courts view such contract, *J*, 235.

How such contracts to be entered into, *K*, 236.

Fulfilment of such contracts, *K*, 236.

——'s estate in simple trust, *Q*, 245.

Right of, to possession of land, *S*, 245.

Rule giving, possession—Applicability, *T*, *U*, 246.

——ected from possession—Liability of trustee, *V*, 246.

——'s possession—Chattels personal, *W*, 246.

——'s estate in special trusts, *Y*, 246.

——'s rights to hold property absolutely, *R*—*U*, 251.

Suit by, in his own name, *W*, 268.

Acquiescence of, in wrongful purchase by trustee—Effect, *A*, 274.

When, loses his right to recover, *W*, 274.

When could ask for re-sale, *X*, 274.

Concurrence in breach of trust by, *D*, *E*, 279, 280.

Confirmation of sale by, *S*, 279.

Appointment of relative of, as trustee if valid, *E*—*A*, 312.

Appointment of, or her husband as trustee, if valid, *Q*, *R*, 321

Relative of, if proper persons to be appointed as trustee, *S* *T*, 321.

Charitable trust, Extended meaning of the term, *O*, 7.

Charitable endowments, What are, *Q*, *R*, 8.

Charity, Meaning in English Law, *M*, 7.

What are charitable objects—English Law, *N*, 7.

Distinction between public and private—Difference—Perpetuities, *B*, *C*, 9.

Chattels personal, *Cestui que trust*'s possession, *W*, 246.

Class of persons, Time allowed to, *G*, *H*, 275.

Co-ercion, Bequest of which revocation is prevented by *S*. 63, pp. 338, 339.

includes fear, *R*, 339.

Imaginary fears, *S*, 339.

Commission agent, mixing his goods, with those of principal, *U*, 295.

Compounding creditors, Advantage secretly gained by one of several, *S*, 93, p. 351.

secret agreement by creditor, *Y*, 351.

Confidential relation, Transaction—Points to be considered, *V*, 346.

Confirmation, Requisites of, *U*—*Z*, *A*—*C*. P. 279.

Party to be *sui Juris*, *V*, 279.

Act of—to be a deliberate one, *W*, *X*, 279.

No “*suppressio viri*” or “*suggested falsi*”, *Y*, 279.

to be distinct and independent, *A*, 279.

No co-ercion or undue influence, *B*, 279.

To be joint act of whole body, *C*, 279.

Constructive notice, through solicitor, *H*, 261.

Constructive trust, Power of Court to raise a, *Y*, 54.

Wrongful invasion or continuous possession of stranger will not make him a constructive trustee, *W*, 57.

Meaning of, *V, W*, 339.

Trustee's agent not a constructive trustee, *X*, 339.

Instance of, *Y*, 340.

Alleged agent of decree holder, purchase by, *P*, 345.

Onus probandi, *W*, 346.

Equity of redemption—purchase of, by one co-sharer, *S*, 350.

In cases not expressly provided for, *S* 94, 351, 352, Scope of *S*. 94, *Z*, 352

Constructive trustee, disabilities of, *U, V*, 237.

Factor, agent etc., *H, I*, 342.

Mortgagees, *J—M*, 342

Tenants in common, *N*, 342

Trustee's agents, *O, P*, 343.

Directors, *Q, S*, 343.

promoters, *T*, 343.

principal and agent, *C, D*, 344.

Partner, *E—I*, 344.

Guardian and ward—Medical or spiritual advisers, *J, K, L*, 344 345

Husband and wife whether, *M*, 345.

Contract, who are competent to, *Y*, 57.

Capacity to enter into, by that law governed, *Z, A*, 57.

What is a sound mind, for contracting, *N*, 59.

Capacity of a Hindu female to enter into a contract without her husband consent, *X*, 60.

by trustee—solicitor with beneficiary, *M*, 236.

by trustee, for allowance, with Court, *N*, 236.

Effect of omission to, *O*, 236.

Property acquired with notice of existing, *S*. 91, pp. 350, 351.

Contract of sale, Possession—subsequent attachment by third party, *U*, 350.

Subsequent sale to one having knowledge thereof, *V*, 350.

Contribution, as between co-trustees, *F, Z*, p. 155, 156, 157.

principle as to, *F, G*, 155.

between co-trustees, *H—J*, 155.

rule as to, extension of—, *K*, 155.

exception to the general right of English Law, *Q—W*, 156.

Between co-trustees when not allowed, *X & Y*, 156.

among co-trustees—Limitation—English Law, *C*, 157.

Suit for parties to suits for, *D, E*, 157.

unenforceable in suit against trustee for breach of trust *H*, 157.

in respect of costs, *G*, 157.

Impounding fund in Court, suit for *H, I*, 157.

Conversion of perishable property, S, 16, pp. 102—108.

S. 16, explained W, X, 102;

application of rule in 16, X, Z, 102,

Reason of rule in S. 16, A, B, 103,

Limit of rule—English Law, C, 103.

Law as to, before passing Trust Act, D—K, 103, 104,

Scope of rule as to conversion in S. 16—Burden of proof, L, 104.

Exception to the rule as to conversion, M—Q, 104, 105,

Rule as to conversion not applicable to property given specifically, R—V, 105.

Indication in favour of allowing tenant for life to enjoy specifically, W, 105.

Examples of allowing tenant for life to enjoy specifically X—Z, A, 105.

Rule as to conversion applies to lease-holds, B, 106.

A gift of 'rents' of lease-holds may import an intention,

Contrary to application of rule in S. 16, 106.

Rule as to conversion applies to unauthorised securities, D, E, 106.

Rule in S. 16 not applicable where contrary intention is expressed, F, 106.

Rule in S. 16 not applicable where impliedly negatived, G—K, 106.

Trust to pay the "dividends", L, M, 107

Gift "of income", N, 107.

Partial, O, 107.

Application of the rule as to mortgagee, to Q—R, 107.

—, not to affect relative rights of beneficiaries, U, 107

Direction not to convert property until expiration of certain period, V, 107.

of special trust into simple trust, J, 248.

Conveyance, right to call for, X, 246.

how effected—person other than European British subject L, 257.

how effected—European British subjects, M, 258

Co-owner, making improvement, P, 349.

Corporation Power of, to create trusts—English Law E, 58,

Whether can be beneficiary, C, D, 64

Costs, Trustee liable to pay, for chicanery J, 115.

if accounts are kept in confusion, K, 115.

if he denies assets and contrary is established, L, 115.

in Court's discretion, M, 115.

to be discharged out of trust estate, L, 250,

of repairs, D, 277.

Payment of costs for retiring trustee, W, X, 305.

Of trustee retiring on proper ground, H, 306

of trustee's representatives refusing to act, I, 306

Complication of trust, J, 306

to be borne by trustee retiring capriciously, K, 306.

Appointment of new—trustee, S—V, 313.

Co-trustee, Non-liability for—'s default S. 26, pp 150—151, S, 26, explained, U, 105—

Reason for rule in S, 26, V—X, 151

Co-trustee—(Concluded).

Joining in receipt for conformity, *S.* 26 pp. 150—154—section 26 explained, *U*, 150—Reasons for rule in *S.* 26—*V—X*, 151.

Protection against acts of, *Y, Z, A—C*, pp. 151, 152

General liability of, 154 *C* to *E*, 155

contribution as between, 154.

liability of in cases of theft and fraud by co-trustee, *E*, 163.

cannot act singly *S.* 48, pp. 131—133;

Rule involved, *X*, 131. •

Principle of *S.* 48, *Y*, 131.

stocks in names of several co-trustees—Dividends and rent, *J*, 232.

not to sever in legal proceedings, *L—N*, 233

not to permit one of the cotrustees to sign cheques, *Q, R*, 233

Bonds payable bearer—dot to allow same bonds to remain with one of the co-trustees, *S*, 233

may not lend to one of the trustees themselves, *S.* 54 pp. 244, 245.

—'s account, sanction of, *X*, 249.

Crown, whether can be beneficiary, *B*, 64.

Custody, of deeds, *D*, 97.

of non-negotiable securities, *F, G*, 97.

of stocks—Case where less elaborate precautions held sufficient, *H*, 97, general as to, *A*, 160.

Trustees right to—of title-deeds, *B F*, 160.

when tenant-for-life entitled to, *II, I*, 161.

Executor's right to.—Leaseholds, *M*, 161.

Trustee-in-bankruptcy, Custody of, *N*, 161.

of vouchers. settlement of trust accounts, *I—K*, 198.

of the title deeds, *C—F*, 254.

trustee may sue for, of title deeds, *C, H*, 254.

of deeds—tenant for life, *L—It*, 255.

of deeds—Mortgagees of life estate, *V*, 256

Cypres doctrine, Applicability of—Public and private trusts, *J, K*, 10

D

Debtor, becoming creditor's representative, *S.* 87, p. 340.

Debts, barred against trustee, barred also against beneficiary.

Within scope of trust created by deed, *O*, 79.

Where trust created by will, *P*, 79.

Settlor's, contracted for necessities, *Q*, 79.

barred by limitation, *R*, §. 79.

Trustee for payment of, to pay immediately, *T*, 80.

Case where interest exceeds double of principal, *Y*, 80.

Presumption where property conveyed for, being converted into money, *Z*, 80.

Creditor's right to sue for administration of unclaimed funds, *A*, 80.

Debts—(Concluded).

- to be soon reduced to possession, *M*, 88.
- Procedure, where whole, cannot be recovered, *N*, 88.
- Presumption, as to, *O*, 88.
- Debtor's bond not sufficient security, *T*, 88.
- to be realised speedily, *I—K*, 97, 98.
- Releasing or compounding, *L*, 98.
- Transfer of, or charge, if affected by S. 63, *P*, 292.

Deeds, Tenant for life—long residence abroad—effect, S, T, 255.

- Probability of showing, to adverse claimants, *U*, 256.

Delay, as bar to relief—Considerations by Court, N, 275.

- Effect of—Express trust—*O*, 276.

Delay, by beneficiary Poverty, how it affects, P, 276.

Delegation, Whether trustee bound to transact business personally, O, 95.

- by trustee in discretionary trusts . in sales . leases, *S—V*, 228.
- by trustee . his responsibility, *W—Y*, 229.
- by trustee in moral necessity—instances . what amounts to moral necessity—
Trustee may act through agents in moral necessity, *D—I*, (229—230).
- by trustee in sales . control over sale proceeds, *J*, 230.
- by trustee, distinguished from appointment of proxy, *S, T*, 231.
- by trustee : English Law, *W*, 231.

Deposit, in Government Savings Bank, S. 21, p. 122.

- of bearer securities, *C, D*, 163.

Discharge, of trustee—Misbehaviour of trustee, I, 303

- Bankrupt trustee, *J, K*, 304.
- of trustee, by beneficiaries, *M—T*, 304.
- beneficiaries to be *sui juris* *M—O*, 304.
- concurrence of majority of beneficiaries insufficient for discharge of trustees, *P, Q*, 304.
- of trustee forcible removal, *R*, 304.
- beneficiary not in existence, *S*, 304.
- trustee obtaining sanction of all beneficiaries, *sui juris*—Effect, *T*, 304.
- of trustee, *S*, 71. pp. 302—305.
- No new trustee can be found—trustee's right to be discharged, *B, C*, 305.
- Of executor, when can be made, *D*, 306.
- Effect of, of executor, *E*, 305.
- Of trustee, by order of Court, *D*, 305.
- Duties becoming complicated, *Y*, 305.
- On application to Court, *Z, A*, 305.
- Petition to be discharged from trust, *S*, 72, pp. 305—307.
- Trustee desiring to retire from mere caprice, *L*, 306.
- Trustee entitle to, not bound to nominate substitute, *M*, 307.
- Application for—Procedure—English and India law, *O—Q*, 307.

- Disclaimer*—of powers by one trustee—Effect, *W*, 184.
 by trustee, *L—Z*, (219—223).
 how made, *L*, 219.
 by deed . form : English Law, *M*, 219.
 by conveyance : by conduct . at the bar . by word of mouth . by writing, *N—S*, 219.
 Renunciation of probate, if amounts to—, trust for real and personal estate and trust for sale of real estate—, renunciation . *T—W*, 220.
 Partial—if possible, *X, Y*, 220.
 Of Office, effect of, on estate—, *Z*, 220.
 Effect of—on the instrument, *A*, 220.
 Should be without delay, *B—D*, 221.
 By executor, effect of, on powers of sale Discretionary power, *E, F*, 221
 By trustee, effect of, on real estate and on sale by Administrator, *G, H*, 221.
 Of powers, effect of, *I—K*, 221.
 By married woman (trustee), *L*, 222.
 Of protectorship, *M*, 222.
 Form of—Chattels, *N*, 222.
 by trustee his subsequent action as agent in trust, *O*, 222
 at bar : costs, *P*, 222.
 costs of advice as to *Q*, 222.
 to be within reasonable time, *R, S*, 222.
 how operates on title of remaining trustee , *U*, 222.
 Effect of—by trustee, *V—Y*, 223
 Effect of, on powers, *Z*, 223.
 by trustee—Effect of, *U*, 308.
 Of trusts amounts to retirement—Appointment of new trustee justifiable, *V, W*, 308.
Discretionary trusts, Examples of, *Q, R*, 15.
Disqualified proprietor, in Oudh, position of, *P*, 59.

E

- Endowment*, Contrary to public policy, *J*, 36.
Equitable interests, series of, *P, Q*, 250.
 Testamentary disposition, *L*, 261
Equitable relief, Presumption against a class of person., *N, O*, 284.
 Bar to, from public or private inconvenience, *P, Q*, 284.
 Bar to, from laches of beneficiary, *R, S*, 284.
Equity never wants a trustee, The maxim, *M*, 262.
Execution of trust, Suit for, *V*, 262.
 Right to sue for, *S. 59*, pp 262, 263,
Executor,—whether entitled to benefit of *S. 34* of the Act, *J*, 176
 cannot refer to Court under *S. 34* of the Act His remedy, *R*, 177.
 if entitled to be discharged under *S. 35 B*, 181.

Executor—(Concluded).

if empowered to grant leases, *M*, 198.

——'s power to convey, *F*, 203.

——'s power to vary investments, *II—N*, 203—204.

——'s discretionary power to vary investments, *II, I*, 203.

——'s discretion to vary interference by Court, *J*, 203.

——'s powers to vary, scope of, *K*, 203.

Receipt of—, when sufficient *G*, 207.

with no power to give receipts. duty of purchasers, *II, I*, 207.

receipts by—Duty of vendee, *H*, 209.

transactions by—Fraud, effect of, *F*, 209.

Sale by for payment of his own debt, *II*, 209

payment to—who misapplies effect of, *I*, 209.

payment to—after long interval from testator's death, *J, K*, 209

——'s power to allow time for payment of debts due to estate, *F*, 215.

power of—to compromise co-executor's claim, *G*, 215.

can pay time-barred debts, *Z*, 215.

power to—to compound, nature of, *I*, 217.

renunciation by—Effect of, *T*, 222

'S duties after administration suit No, (224, 225).

payment of debts by—*D—H*, 226.

following testators directions if liable. *C*, 229.

may appoint accountant, *C*, 237

Non-action by—Legacy given to him by testator, *E*, 238

Discharge of, by Court—Vesting of property in, *D—F*, 322.

Executor de son tit, Whether can be trustee, *K—M*, 68

Liability of, under H. Law, *N*, 68.

How power to pay own debt out of assets, *O*, 68.

Consent of heir to payment to himself by, *P*, 68

Suit by creditor where there is, *Q*, 68

Executors—testators' creditors—Their respective rights, Z, 170.

Extent of right of, *A*, 170

Powers of *F, G*, 185.

Lien of—for costs, *H*, 185.

right to indemnity: right to pay time-barred debts right to pay subscriptions
promised by testator, *I—N*, 185, 186.

Discretion of—*O, P*, 186.

Appropriation of legacy by—Effect, *R—Q*, 186.

Express trustee, Disabilities of, *T*, 237.

Express trusts, Either executed or executory, *H*, 14.

Extinction, of the, of trusts, Ch. VIII, Sec. 77—79, pp. 323—327.

F

Female, Appointment of, as trustee, if valid, *Y*, 321.

Fiduciary, proper terms for expressing, purpose, *A*, *B*, 48.

Advantage gained by, *S*, 88, pp. 340—347—Scope of *S*, 88, *A*, 341—Principle of, *S*, 88, *B*, 341.

Advantage gained by—Constructive trust, *G*, 341.

Common instance thereof—Renewal of leases, *D—G*, 341, 342.

Forfeiture of property, law as to, in British India, *O*, 158.

Forgery, Liability of trustee for being misled by, *F*, *G*, 131.

Fraud, Examples of, *I—N*, pp. 42, 43.

„ in heir, *I*, 42.

„ in devisee, *J*, 43.

„ in legatee, *K*, *L*, 43.

„ in one or two joint legatees, *M*, 43.

„ trust for payment of debts, *N*, 43.

„ limitation as to doctrine of, *O*, 43.

Sale of trust estate : what amounts to—, *G*, 209.

Or misbehaviour of trustee—A sufficient cause for interference, *Y*, 234.

Property obtained by, *Z*, 340.

must be proved, *A*, 340.

Funds, payment of trust—Discretionary powers of trustee, *H*, 188.

G

Gift, No persons unborn at testator's death, *I*, *J*, *K*, pp. 34, 35.

to children of unborn persons, *K*, 35.

to a class, *F—G*, 39, 40.

Rules as to, under Hindu Law, *H—K*, 40.

to idols, *H—S*, 40.

to an idol not in existence, *L*, 40.

for daily worship of Thakoor, *Q—S*, 40.

Locus standi of third parties to contest not in writing *A*, 41.

Death-bed—Validity of—Verbal, *E*, 42.

Merely intended, *Z*, 54.

Duty of persons taking charge of gifts to religious or charitable institutions 55.

Intervention of trustee cannot legalize what cannot be done by direct, *R*, 56.

to a solicitor by client, *U—Z*, *A*, *B*, 344.

Government, meaning of, *P*, 158.

Governor-General-in-Council, Legislative power of, *S*, 4.

Gratuitous trustee, Rule of conduct for, *X*, *Y*, 86.

Gross laches, Effect of, *H*, *I*, 300.

Guardian,—'s power to vary investments, *L*, 204.

H

Heir purchasing incumbrance, position of, *S*, 239.

Hindu endowments, Meaning, *P*, 7.

Hindu Law (General), Estates unknown to, *Y*, 36.

Rules as to gift under, *H—K*, 40.

Effect of *S. 5* on, *X*, 41.

Voluntary declaration of trust, *S*, 56.

Executor *de son tort*, liability of, under, *N*, 68.

Kurta—managing member—liability to account, *B*, 256.

——(*Joint family*), Manager of, not a trustee, *B—E*, 5, 6.

Position of manager with regard to minor members, *P*, 6.

——(*Widow*), Title of, to husband's property, not in nature of trust, *H, I*, 6.

Hospital, if charitable institution, *Y*, 9.

I

Idol, Bequest to, *Z*, 36.

Gift to an, not in existence, *I*, 40

when begins to exist, *M—P*, 40.

Gift for daily worship of Thakoor, *Q—S*, 40.

Gift to—Necessity for trust, *L—N*, 55.

Family property—Trust in favour of—Partition, *P*, 56.

property dedicated to—Rights of heir's, *S*, 252.

Impounding, See beneficiary.

Income Tax Act, English Law, *R*, 38.

Indemnity, practice as to introducing clause of, in trust deeds, *S*, 159.

Effect of clause of, *T—V*, 159.

clause for—, and reimbursement of trustees deemed to be in trust instruments.
W, 159.

clause of—Employment of agent—*Onus Probandi*, *X, Y*, 159.

Indian Succession Act, Married-woman, subject to, position of *M*, 300.

Infant, Appointment of, as trustee, if valid, *X*, 321.

Inspection, Right of beneficiary to inspect and take copies, *Q, R*, 252.

when does right to inspect come into existence, *T—V*, 254.

directly or through solicitors, *W*, 254.

Right to inspect and take copies of instruments of trust, accounts, etc., *S. 57*, pp.
253—256.

Instrument of trust, what is called, *S. 3, P*, 12.

Insurance for life, *T, U*, 38.

Liability of trustee with reference to, *K—M*, 131.

Interest, rate of, *Y, Z, A*, 108.

See BREACH OF TRUST AND TRUSTEE, pp. 144—148.

Grounds on which compound, charged, *T—V*, p. 147.

Interest—(Concluded).

Cases where compound, will be charged, *W, X, 147.*

General rule in respect of, *A, B, 277.*

Exterminating circumstances, how affect—Rate of, *C, 277.*

Investment, of trust, money, *S. 20, pp. 116—122.*

Scope of *S. 20*—Section 20 imperative, *Y, W, 117.*

Law before passing of Trust Act, *X, Z, 117, 118*; rule in *S. 20* applied to guardian of minors, *A, B, 118.*

Necessity for, *D, 118.*

Trustee not to invest in personal security, *E, F, 118.*

Even if larger interest if obtainable, *G, 118.*

Even if there be joint security of several obligors, *H, 118.*

Even to one to whom testator himself lent on personal security, *I, 119.*

Court will not interfere with trustee's discretion as to one of several authorised modes of, *T, U, 120.*

Subject of security mainly used for purposes of trade, *O, 122.*

Mortgage of land pledged to Government under Act XXVI of 1871, *S. 21, P, 122.*

Deposit in Government Savings Bank, *S. 21, P, 122.*

of trust funds, *O, P, 233.*

of trust moneys on personal security, *I, J, 244.*

Power to lend on personal security under instrument, *K, 245.*

Power to lend on personal security—Lending to one of co-trustees, if allowed, *L, M, 245.*

Lending of trust moneys on mortgage to one of trustees if allowed, *N, O, 245.*

J

Joint owners, Rights of, *W—Z, A, 256.*

Judicial trustee, Appointment of, *F, 263*

K

King, Power of, to create trusts, *C, D, 58.*

L

Laches, When bar to equitable relief, *I, J, 275.*

"*Law*" in *S. 4*, includes what *S. 4, P, 32, T, p. 40.*

Lease, by trustee: period of lease, *N, O, 194.*

by trustee: reservation of rent, *O, 194.*

trustee's power to grant certain—, *P—S, 189.*

by trustee: simple interest, *T, 189.*

by trustees for sale, *U, 189.*

Legacy, making good loss, *E, 259.*

Legatee, not entitled to copy of accounts at expense of estate, *G, 115.*

Right of, *Z, A, B, 264.*

Right of, or next-of-kin to sue, *X, 268.*

Legislature, Evasion, H, 353.

Lien, See vendor and vendee.

of trustee entitled to priority, *N, 169.*

does not extend to trustee's agent *O, P, 169.*

in case of precatory trust, *Q, 169.*

Limitation, See LIMITATION ACT.

over on bankruptcy of settlor himself, *M—P, 38.*

over on alienation, *Q, 38.*

Reason why, is no bar to suit against express trustee *S, 138.*

Constructive trust will be barred, *T, 138.*

Adverse possession—cause of action—Trustee, and *cestui que trust, A, B, 252.*

Whether bar to equitable relief—Direct trust, *X, Y, 282.*

Deb'—Subject-matter of trust, *Z, A, 282.*

Fraud—Equitable relief, *B, C, 282, 283.*

fraud, nature of such, *O, 283.*

fraud, not to be subsequent to the accrual of cause of action, *H, 283.*

Equitable relief—Bar from presumption, *F, 283.*

Time, within which the presumption is raised, *I—I, 283.*

Ground of such presumption—Quitting possession, *J, K, 283.*

Invalid trust—Right to recover trust property, *W, 287.*

Limitation Act, Trustee as defined in, F, G, 17.

S. 10, scope of, *F—R, 136—137.*

suits falling under, *F—I, 136,*

suit not falling under, *J—R, 137, 138.*

Lis pendens, effect of, on new appointment, M—N, 312, 313.

Lunatics, Power of, to create trusts, F—J, 58,

Power of, at lucid intervals, *L—L, 58.*

Marriage settlements of *M, 59.*

M

Mahomedan Law, Appointment of new trustees—Management of trust, C—E, 314.

Maintenance, power of trustee to allow—out of capital, F, 193.

Trustee's power to apply property of minors for, *R—V, 205.*

Provision for—Trustee's opinion, *R, 205.*

Direction to give—Court's control, *S, 205.*

Whether trustee can give, *T—V, 205.*

Malabar tarwad, Karnavan of position of, G, 6.

Management, of trust—Decision of majority binding on trustees, D, 187.

Marriage, Interests and powers not acquired nor lost by, X, 60.

Mesne profits, Trustee committing breach—Remedy of beneficiary—Account of, when given, Y, Z, 285.

Account of—Express trust, *A, 285.*

Following trust property into the hands of volunteer claiming under a trustee *B, 285.*

Mesne profits—(Concluded).

General rule—English Law, *C—F*, 285.

Assignee of trustee, liability of, *G, H*, 285.

Ministerial trust, Example of, *P*, 15.*Minor*, Act of majority of persons domiciled in British India, *A*, 60.

Age of majority, how computed, *B*, 60.

Settlement of—'s property in contemplation of marriage—Indian Law, *C*, 61.

Persons capable of making wills, *D*, 61.

Infant's will—English Law; *E*, 61.

beneficiaries, interference of Court on behalf of *J*, and *M*, 65.

Mortgage Equitable—Investment by trustee—English Law *K, L*, 121.

Trustee not advised to advance on second, *J*, 121.

Loan on, of an undivided share of a reversion, *I*, 121.

Loan on, existing, *H*, 121.

Trustees not to lend on, to one of themselves, *G*, 121.

Loan on sub-mortgage—English Law, *M*, 122.

Loan on, of buildings, *N*, 122.

of land pledged to Government under Act XXVI of 1871, S. 21, p. 122.

with knowledge of facts revealing existence of equitable right, *X*, 351.

Mortgagee, of all beneficial interest, *Y, Z*, 251.

in possession, *O*, 349

Mortmain Act, Case under English, where action against trustees was barred, *F*, 93.

N

Negligence, Trustees liable only for gross, *G*, 87.*New trustee*, Duty of Court in appointing, *O—Q*, 265.

Costs of appointment of a, prior to Trustee Act, 1893, *L*, 304.

Appointment of, on death etc., S. 73, pp. 307—

Provision of S. 73, source of, *T*, 307.

Appointment of—Absence of trustee from United Kingdom—English Law, *Z*,
A—C, 309.

Absence of trustee for more than 12 months, *Z*, 309.

Concurrence of such trustee if necessary for new appointment, *A*, 309.

Willingness and competency of trustee out of United Kingdom—*Onus*, *B*, 309.

Temporary absence of trustee—if sufficient for appointing, *C*, 309.

Trustee residing abroad, *D—F*, 309.

Incapacity a ground for appointing, *J—L*, 310.

Lunacy of person with power to appoint trustee—Duty of Court, *M*, 310.

to be within jurisdiction, *B*, 311.

Appointment of—Whether actual conveyance of trust estate necessary to perfect
title, *U—X*, 311.

Old law—divergence of views, *U—X*, 312.

Present English Law—conveyance necessary, 311.

Stamp on appointment of—English Law, *Y*, 311.

New trustee—(Continued).

Proper appointment of—refusal of old trustee to transfer trust estate—liability of latter, *Z*, 311.

Two trustees under a settlement—Retirement of both—Appointment of one instead if valid, *A*, 311.

Infructuous appointment of,—Effect, *L*, 312.

Appointment of—Costs, *S—V*, 313.

Appointment of—Their powers, *W*, 313.

Appointment of—Inquiries to be made by him, *X, Y*, 313.

Executors not obtaining probate, alienation by—Title of alienor—Appointment of—Whether alienor can vote at election, *B*, 314.

Mahomedan Law—Appointment of,—Management of trust, *C—E*, 314.

Invalid appointment—Rectification, *F, G*, 314.

Appointment under invalid power—Rectification of powers, *H*, 314.

Missing of part of trust—estate—how appointed, *I*, 314.

By whom to be appointed, *J*, 315.

Power of nomination to legal representative, *K, L*, 315.

Refusal by representatives of deceased trustee to appoint—Application to Court for appointment, costs of, *M*, 315.

Both trustees wishing to retire—Appointment of, *S, T*, 315.

Appointment of—Concurrence of retiring trustee not necessary for appointment, *U*, 316.

Appointment of, by Court—Increase or decrease of original number, left to Courts' discretion, *B—F*, 316, 317.

Appointment of—Power of former trustee when ceases, *N—P*, 317, 318.

Appointment of, *S. 74*, pp. 318—321.

Rules for selection of, *S. 74*, pp. 318—321.

Principle of appointing new trustees,—General jurisdiction of Court, *U, V*, 319.

When Court would interfere to appoint, *W*, 319.

Cases in which the Court would appoint, *Y—Z*, 319, 320.

Procedure in appointment of,—Originating summons, *G, H*, 320.

High Court to be moved by petition for appointing *J*, 320.

Application for appointment of, costs of, *K*, 320.

Direction of, settlor to be adhered to, *L, M*, 320.

Appointment of, to benefit all beneficiaries, *N*, 320.

Appointment of, to further the execution of trust, *O*, 320.

Proper person for appointment of—General rule, *P*, 320.

Appointment of, out of jurisdiction, when valid, *U*, 321.

Appointment of, in appellate Court—Competency of trustee—Evidence subsequent to original hearing, if allowable in respect of, *W*, 321.

Vesting trust property in, *S. 75*, pp. 321—323.

Exercise of powers by, *G*, 322.

No trustees under will—Court's jurisdiction to appoint, *H*, 322.

Duty of, with regard to ascertaining prior incumbrance, *I, J*, 322.

New trustee—(Concluded).

Vesting of trust property in—Source of this provision, *Z*, 322.

Court to make vesting order—English Law, *A—C*, 322.

Powers of, *S*, 75, pp. 322, 323.

Notice, Principle of, *N*, 18.

defined, *S*, 3, pp. 12, 18—32.

Definition of, *O, P*, 18.

Question of fact, *Q*, 18.

must be in the same transaction, *S*, 18.

Distinct from knowledge, *T*, 18.

Inaccuracies in—Effect of, *U*, 18.

Recitals in deed, *V*, 18.

Time of notice, *A, B*, 19.

Service and proof of, *C, D*, 19.

Secondary evidence of contents when given, *E, F*, 19.

Casual conversations not, *W*, 19.

Suspicious circumstances or general report, whether, *X*, 19.

By whom to be given, *Y*, 19.

How to be given, *Z*, 19.

to agent—effect on principal, pp. 30—32.

Agent, definition of, *X*, 30.

Notice to agent is notice to principal—Reasons, *Y*, 30.

Essentials to affect the principal, *A, B*, 31, 32.

Purchase—Constructive notice through solicitor, *N*, 32.

Attorney and client—Fraud of attorney, *O*, 32.

to trustee, *J—O*, 259, 260.

given to one of several co-trustees, *P, Q*, 260.

given simultaneously, *X*, 260.

to all trustees—All die—Latter incumbrances by, to new trustees, *Y, W*, 260.

Solicitor's position as creditor under insolvency, no, of such insolvency, *I*, 261.

Property acquired with, of existing contract, *S*, 91, pp. 350, 351.

Actual and constructive, *Y*, 290.

After part-payment, effect of, *Z, A, B*, 290

—(*Actual Notice*), Actual Notice, pp. 18—20.

Essentials of, *R*, 18.

—(*Constructive notice*), Constructive notice, pp. 20—30.

Three cases of, *H*, 20.

English and Indian Law, *I*, 20.

Nature and definition of, *J, K*, 20.

Principle of, *L—O*, 20, 21. *

Limits of, p. 21.

When applicable generally, *Q, R*, 21.

Doctrine of, applicable to Government, *S*, 21.

Notice—(Concluded).

Doctrine of, when not applicable—Commercial transaction and negotiable instruments, *T, U, 22.*

Exception to rule as to commercial transaction, *V, W, 22.*

Wilful avoidance of inquiry, *Y, 22—24.*

Wilful, meaning of, *X, Y, 22.*

Cases in which wilful abstention proved or presumed, *Z, A, K, 22 23.*

But honest desire to arrive at truth not a wilful abstention, *L—O, 23.*

Gross neglect, *P—V, 24.*

Negligence, meaning of, *P, Q, 24.*

Its nature and operation, *R, S, 24.*

Generally it excludes fraud, *T, 24.*

Case of gross neglect in sales, *U, 24.*

Transfer by trustee—Gross neglect of transferee, *V, 24*

Registration as notice *W—Z, A—F, 25.*

English and India Law, *W, X, 25.*

Registration is notice in Bombay and Allahabad—Reasons, *Y, Z, A, 25*

Contra, in Madras, Calcutta and Central Provinces—Reasons, *B—D, 25.*

Fraudulent Registration, no notice, *E, 25.*

Registration is notice only of registered documents, *F, 25.*

Possession as notice, *G, U, 26, 27.*

Reason of the rule, *J—I, 26.*

But it must be actual, *G—L, 26.*

Possession as notice—Recognised by Registration Act, *M, N, 26.*

Previous possession.—No notice, *O, 26*

Registration more favoured than possession *P, Q, 27.*

Possession no conclusive evidence of notice—Calcutta view, *R, 27.*

Lis pendens—English and Indian Law, *V, Y, 27, 28.*

Notice of deed, notice of its contents—Examples—Above rule applicable to parties only, *Z, A—D, 28.*

Notice of fact is notice of its reason—Examples, *E—J, 28, 29.*

Notice by condition of premises—Examples, *K—M, 29.*

Cases which have been held to be no notice, *N—Q, 29.*

Presumption in respect of notice, nature of, *R, 29*

Notice to one of several trustees—Effect—Reason, *S, T, 30.*

Fraud in decree—Effect on purchaser, *U, V, 30.*

Misrepresentation by minor as to age—Effect, *W, 30.*

Nuncupative will, of Hindu, *Y, Z, 41.*

O

“*Obligation*” in S. 2—Definition, *W, 16.*

Obligor's duty, liability and disability, S. 95, pp. 352, 353—Scope of S. 95, *F, 353.*

Onus probandi, in cases of confidential relation, *C—F, 347, 348.*

Opinion, given by Court under S. 34 of the Act, appeal if lies from—English Law
S—U, 177.

given by Court. Lord St. Leonards Act V, 177.

Court when not bound to give—under S. 34, Y, 178.

When Court would interfere to give. Z, 178.

P

Paul trustee, some rule for, Z, A, 87.

Parol evidence, Admissibility—Rebutting, K, 331

Instance where such, was admitted, L, M, 331.

Parties, Joinder of, in suit between third parties and persons beneficially interested, P,
85.

Court will not adjudicate on breach without hearing all, before it—Joinder of,
P—N, 133, 134.

Partners and executors, liability of, Q—U, 345, 346.

Partnership, Partners when liable for wrongful employment, X, Y, 296.

Right of beneficiary to follow trust-moneys into the hands of a firm, Z, A—D,
296, 297.

Deceased partner's funds used in trade by surviving partner as his executors, B,
297.

Trustee trading with deceased partner's money, P, 297.

Wrongful employment by partner-trustee of trust property for, purposes, S. 67,
pp. 296, 297.

Principle of S. 67, W, 296.

Determined—Partner retaining assets instead of winding up—Effect, G, 297.

Partner-trustee, Wrongful employment by Partner-trustee of trust property for partner-
ship purposes—S. 67, pp. 296, 297.

Principle of S. 67, W, 296.

Payment of rent—Possession, S. 27

Possession of partners and tenants-in-common, T, U, 27.

Perishable property, Conversion of, S. 16, pp. 102–108—S. 16, explained W, X, 102.

Application of rule in S. 16, X, Z, 102.

Reason of rule in S. 16, A, B, 103.

Limit of rule—English Law, C, 103.

Prepetuity, Object of rule against, P, 34.

According to Hindu Law, G, H, 34.

Person, Definition of, Z, 64.

Personal security, Investment of trust moneys on, I, J, 244.

Power to lend on, under the instrument, K, 245.

Power to lend on—Lending to one of co-trustees, if allowed, L, M, 245.

Petition,—by trustee to Court for opinion in respect of management of trust property,
L—U, 176, 177.

by trustee soliciting Court's opinion, how made, M, 176.

by trustee for Court's opinion. procedure in cases of doubts, N, 176.

by trustee for Court's opinion. caution by Court in according sanction O,
176.

Petition—(Concluded).

by trustee under S. 34, his right to costs of, *N*, 179.

to be discharged from office of trust, S. 72, pp. 305—307.

Possession, persons in lawful, *Q*, *R*, 350.

Powers, given to trustees joint in nature, *S*, 184.

how to be exercised; conferred on trustee when passes with estate, *T*—*V*, 184.

Assignment by trustee,—Effect of, on powers, *X*, *Y*, 184.

Survivorship of, *Z*, *A*, 184.

Exercise of—by trustee. if trustee bound to give reasons for, *B*, 184.

Exercise of special—after decree, 185.

absolute, discretionary—of trustee. Court's power in respect of, *I*, 188.

in the nature of trusts, distinguished from discretionary powers, *K*—*M*, 188,
189

Preamble, to Trust Act, See p. 1

Precatory trusts, what are, *M*, 50.

Tendency of early cases as to, *N*, 50.

Tendency of modern cases as to, *O*, 50.

Creation of, *P*, *Q*, 50.

Presumption, Ignorance, mistake, distress—Effect of equitable relief, *L*, *M*, 283.

Presumption for advancement, Law in Bombay, *D*, 333.

of child—Examples, *Z*, 333.

"Principal Civil Court of original civil jurisdiction," What is a—, *Z*, 60.

Prize of war, Law as to, *P*, *Q*, 11.

Proper, in 'proper' in S. 60, meaning of, *G*, 267.

Proper trustee, Beneficiary's right to, S. 60, pp. 264, 267, Principle of Ss. 60 and 61,
G, *H*, 264.

Public trusts, See *A*, 234.

Public and private trusts, Difference as to use of the fund, *D*, 9.

Difference in condoning mal-administration by trustees, *E*, 9.

Distinction between *Z*, *A*, 9.

Attorney-General when necessary party, *H*—*I*, 10.

Applicability of *Cypres* doctrine, *J*, *K*, 10.

Defects in conveyancing, *L*, 10.

Points of similarity, *N*, *O*, 11.

Difference as to duration—English Law, *I*, *J*, 14.

Purchase, of trust property by third person—General rule, *T*, 290.

Absence of notice at time of—Discovery of trust at time of conveyance, effect of,
U, *V*, 290.

Of shares in companies, *W*, 290.

Complete conveyance to vendee necessary, *C*, 290.

Vendee without notice, from vendee with notice, *D*—*F*, 291.

Vendee with notice from vendee without notice, *G*—*J*, 291.

Bona fide vendee from trustee—Subsequent, by trustee, effect of, *K*, 291.

Purchase—(Concluded).

Choses in action, of, from trustee,—Effect, *L, M, 291.*

Vendee taking better title than vendor, when, *O, 292.*

By person contracting to buy property to be held on trust, *S. 92, p. 351.*

Purchaser, Precautions which, of an equitable interest should never dispense with, *Q, R, 258.*

Benamidar—Beneficial owner—'s liability, *I, 259.*

Volunteers and, with notice, *G, 353.*

Q

Qualified owner, Advantage gained by, *S 90, pp. 348—350.*

Questions, of detail, difficulty, etc. Courts opinion under, *S. 34 A—G, 178, 179.*

of detail : if Court can direct trustees on, *A, B, 178*

of difficulty and importance : Trustees to adopt what procedure, *D, 178.*

of difficulty and importance suits of trustees, Court's jurisdiction over, *E—G, 178 and 179.*

Qui Prior est tempore potior est Jure, General, rule, *K, 261.*

R

Reasonable time, Setting aside sale within,—What *B—E, 274, 275*

for setting aside sale—Circumstances to be considered, *M, 275.*

Receipt, by beneficiary under *S. 34* : Nature of, *V, 181.*

Receiver, Trustee may move to appoint, for repairs, *U, 85.*

Appointment of, by Court, *M, 270.*

“ *Recently* ” in *S. 53*, scope of the term *A, 243*

Registered, Meaning of *S, 3, p. 12, 17.*

Registration Act, 1877, *S. 50*—Duly registered.—meaning of, *L, 17.*

Re-embursement, when trustee is entitled to, *J—L, 164*

Release, Reason for demanding—under *S. 35* Expenses of— *E, F, 182.*

Religious or charitable purposes, *S. 105, Act X of 1865, P, 8.*

Right of beneficiary to, *S. 55, pp. 245, 246, R, 245.*

Renunciation, by trustee, *I—L, 227.*

by executor, *K, L, 227.*

by trustee—consent of beneficiaries, *M, 227.*

Repairs, trustees soliciting sanction for— Direction by Court, *P, 177.*

by trustee—Sanction of Court given under what circumstances, *Q, 177.*

Costs of, *D, 277.* Costs of and improvement,—Equities on setting aside sale—

How affected by fraud, *E—H, 278.*

Repeal of enactments, *S. 2* and note, *11.*

Restraint against alienations, invalid, *I, J, 37*

on anticipation, *K, L, 37. **

„ see *H—M, 252, 253.*

Resulting Trusts, no, in case of charities, *M, 10.*

Declaration of trusts invalid, *M, N, 335*

Bequest with instructions—instruction not carried out—Fraud *O, P, 335.*

Retirement, of trustee—Difficulties justifying retirement to arise in connection with administration of trust, *G*, 302.

justified, *H*, 303.

Revocation, of trust, *S*, 78, pp. 324—327.

Means of, adopted when effectual, *V*, 325.

Destruction of will, when amounts to, *W*, 325.

of trusts not to defeat what trustees have duly done, *S*, 79, *P*, 326.

of trusts, not to have retrospective effect, *M*, 327.

Right to sue, trustee for breach, inalienable, *I*, 257.

S

Sale, of reversionary or future interests, *W*, 108.

by trustee directed to sell within specified time—Burden of proof—*S*, 22, pp. 122—127.

Court will never sanction, in breach of trust, *A*, 124.

held to be improper, cases where, *E—H*, 124.

Transfer—time—limit for, varies with nature of property, *J*, 124.

twelve months the usual time, *K—M*, 125.

valid reasons to be given if usual time exceeds, *N*, 125.

trustee to be given discretion, *O*, 125.

Discretion as to, what it implies, *P*, 125.

Direction to sell with all convenient speed not rendering immediate sale imperative, *R—V*, 125, 126.

Nor indefinite postponement to be made by discretion to sell conveniently, *W*, 126.

trustee liable by postponing, without excuse, *X*, 126.

Persons purchasing after long period should enquire if breach of trust committed, *Y*, 126.

Trust for—Court will extend time if, within period fixed will cause detriment, *A*, *B*, 126.

Court will not compel exercise of discretionary power, *C*, 126.

Whether Court should sell if, trust for sale within 5 years not carried out, *D*, 127.

Court's sanction when necessary, for trustees for sale, *E*, 127.

When such sanction essential, *F*, 127.

Reason why, in breach of trust not enforced by Court, *G*, *II*, 127.

Sale by Court of timber, *J*, 127.

Contract for—Amounting to breach of trust if enforceable, *F*, 128.

setting aside of—Time therefor, *Z*, 274.

Successful impeachment of, *Q*, 276.

Agreement to sell land to A—Subsequent sale of same land to B—Applicability of, *S*, 91, *W*, 331.

Secondary evidence, of contents of notice, when given, *E*, *F*, 19.

Security, Insufficient or hazardous, test of, *Y*, 84.

What, should be realised by trustee, *P*, *Q*, 88.

Security—(Concluded).

Testator's approval of, no reason for trustees continuing it, *R*, 88.

Reason, *S*, 88.

Debtor's bond not a sufficient, *T*, 88.

Duty to enquire, if, is safe, *V*, 89.

mode of protecting deed and security, *W*, 89.

Power of court to require, *Z*, 269.

Service, On opponents to application beyond jurisdiction, *R*, *S*, 307.

Set off, No, allowed to trustee, *S*, 24, pp. 148, 149

Where the loss and gain arise out of same transaction, *O*, *P*, 149.

Where loss and gain arise from two distinct transactions, *P*, 149.

Mutual demands to be in respect of some rights, *G*, *H*, 259.

Sm. C. Courts, Whether, could enforce trusts, *M*, *N*, 79.

Solicitor, Bearer bonds, if can be left with, *T*, 162.

Solicitor trustee, Disability of, *P—S*, 236.

Special trusts, Ministerial and discretionary, *O*, 15.

will proceed, *S*, 248.

Specific Relief Act, Trust as defined in, *C*, 13.

Trustee as defined in, *F*, 17.

S. 10, *O*, 85.

S. 11, *P*, 92.

S. 12, *I*, 245.

Stamp Act, 1879, Art. 36—Gift deed with direction to maintain donor, *Q*, 56.

Stop-order, Fund being in Court, *B—F*, 261.

Superstitious uses, English and Mahomedan Law, *B—F*, 36.

Gift to—English and Indian Law, *F*, 37.

Survival of trust, *S*. 76, p. 323.

T

• *Tenant for life*, Indication in favour of allowing, to enjoy specifically, *W*, 105.

Examples of allowing, to enjoy specifically—*X*, *Z*, *A*, 105.

Proportion of value &c—English Law, *X*, 108.

when—could sue for deeds, *T*, 161.

accepting money in consideration of something to be done which is prejudicial to the trust property, *N*, 345.

Purdanashin lady, *O*, 345.

Any advantages gained by, co-owners, mortgagees, *H*, 349.

Renewal of lease, *I*, *J*, 349.

Waste, *K—M*, 349.

Production of title deeds, *N*, 349.

Tenants-in-common, Co-owners and, not standing in fiduciary relation, *N*, 273.

Testamentary documents, Instrument *inter vivos*, when deemed testamentary, *K*, 52.

Thelluson Act, English Law, *H*, 37.

Title, Trustee to protect, to trust property, *S*. 13, pp. 84—90.

adverse to beneficiary, trustee should not set up, *S*. 14, pp. 91—93.

Title-deeds, Suffered to remain with indebted no-trustee, *X*, 89.

Trustee's solicitor may keep, *Y*, 89.

trustee's right to custody of, *S*, 31, *A—E*, pp. 160—163.

left with solicitor—Trustee's liability, *G*, 161.

trustee's right to—Mortgage of life estates, *K*, 161.

When *cestui que trust* may sue for, *L*, 161.

When—may be with solicitor, *S*, 162.

made of protection of, *W*, *X*, 162.

Safe way of deposit of, *Y*, *Z*, 162.

Mode of deposit of, when they are non-negotiable trust securities, *B*, 163.

custody of, *C—F*, 254.

trustee may sue for custody of, *G*, *H*, 254.

not with trustee—Effect, *I*, 255.

Improperly handing over—Effect, *K*, 255.

Custody of—Tenant for life, *L—H*, 256.

Transfer, by order of *cestui que trust*—Inquiries by trustee, *M*, 250.

Right to—, beneficial interest, *S*, 58, pp. 256—261.

of greater right, *X*, 258.

obtaining, of equitable interest fraudulently, *Q*, 301.

to one for consideration paid by another, *S*, 82, pp. 331—333.

Object of *S*, 82, *S*, 332.

Scope of *S*, 82, *T*, *U*, 332.

for illegal purposes, *S*, 84, pp. 336—338—Object of *S*, 84, *V*, 336; Scope of *S*, 84, *W*, *X*, 336.

Pursuant to rescindable contract, *S*, 86, pp. 339, 340.

Scope of *S*, 86, *T*, 339; General doctrine, *U*, 339.

Transferees, decree against, *G*, 252.

Saving of rights of certain, *S*, 64, pp. 289—292.

Transferor, *in pari delicto* with defendant, *J*, *M*, 338.

Trust, whether known to Hindu and Muhammadan Laws, *E—H*, 2.

if known to Hindu Law—Law before Act II of 1882, *T—V*, 4, 5.

Hindu Law of, and English Law compared, *W*, 5.

Hindu—, how far governed by English Law before Act II of 1882, *X—Z*, 4, 5.

Defined, *S*, 3, pp. 12—16.

Definition, English Law, *U—Z*, 4, 5.

as defined in Specific Relief Act, *C*, 13.

must be annexed to the ownership of property—English and Indian Law, *X—Z*, 16.

Classification of, pp. 13—16.

Public and private—Difference as to use of fund, *D*, 9.

Distinction between public and private, *Z*, 4, 9.

Express, implied, *D*, *E*, 13.

Express, are either executed or executory, *F*, 14.

Either private or public, *H*, *I*, 14.

Trust—(Continued).

- In, confidence need not be express, *A, B, 16*.
 Confidence in whom to be reposed—English and Indian Law, *C, D, 17*.
 Public and charitable—English Law, *K, 14*.
 Public purposes how differ from charitable, *L, M, 14*.
 Resulting and constructive, *G, 14*.
 Simple and special, *N, 15*.
 Lawful and unlawful, *S, 15*.
 Voluntary and for valuable consideration, *V, 16*.
 created for unlawful purpose—Effect, *S, 4, p. 32*.
 created for two purposes one unlawful and other lawful—Effect, *S, 4, p. 32*.
 purpose of, when lawful, *S, 32, pp. 32—40*.
 Of creation of, Chapter II, pp. *32—72*.
 may be created for lawful purpose, *S, 32, pp. 32—40—English Law, P, 33*.
 Unlawful, not permitted by law, *Q, 33*.
 partly lawful and partly for unlawful purpose, *R—U, 33*.
 for illegitimate children, *V—Y, 33*.
 for corporation—English Law, *A, 34*.
 for creation of perpetuity, *B—E, 34*.
 Immoral—Irreligious, *Z, 34*.
 Existence of *cestui que trust*, if, necessary for, to take effect, *L, 35*.
 Settlement of family property for maintenance, *M, N, 35*.
 in restraint of marriage, *O—V, 35, 36*.
 to take effect on future separation of husband and wife, *W, X, 36*.
 unknown to law, *Y, 36*.
 Para: religious ceremonies, *G, 37*.
 The *Thelluson Act*—English Law, *II, 37*.
 for splitting votes—English Law, *S, 38*.
 Consequences on settlor of creating an unlawful trust, *B—D, 39*.
 to perform acts not beneficial to any human being, *W—A, 39*.
 for sale, *Y, 39*.
 for moveable property, *S, 5, p. 41*.
 Scope of *S, 5, U, 41* : policy of *S, 5, Y, 41*.
 to be proved by writing, *W, 41*.
 for immoveable property, *S, 5, pp. 41—43* ; Scope of *S, 5, U, 41* ; policy of *S, 5, Y, 41*.
 Handing over property in anticipation of death—creation of, *B—D, 42*.
 creation of, *S, 6, pp. 43—57*.
 Scope of *S, 6, P, 44*.
 English Law, *Q, 44*.
 Difference between English and Indian Law, *R, 44*.
 Reason for the rule in *S, 6*—Language of, deed, *V, W, 48*.
 Two modes of creating—English Law, *S—U, 44, 45*.
 “should transfer trust property” in *S, 6*—Meaning, *G, 52*.

Trust—(Continued).

Applicability of S. 6 to deed of gift by Muhammadans—Necessity for possession, *D—F*, 54.

Father opening account in son's name—Declaration of trust, *U*, 45.

Rule of English Law, *V, W*, 45

Uncertainty as to beneficiary, *X—Z*, 45, 46.

as to family, *X—Z, A—C*, 45, 46.

Created when author of trust indicates with reasonable certainty, pp. 45—48.

as to heirs, *D*, 46.

as to relations, *E—H*, 46.

as to descendants, *I*, 46.

as to devolution in case of uncertainty, *J*, 46.

Where intention of objects doubtful, *K*, 46.

Where there is no *cestui que trust* to enforce, *L, M*, 46

Examples, *N*, 47.

Uncertainty as to subject-matter, *N—Q*, 47.

to wife, *O—Q*, 47.

Example, *R*, 47.

Difference between uncertainty as to property and as to beneficiaries or details of trust, *S*, 47.

Uncertainty as to way in which property is to be applied, *R—S*, 47, 48.

Uncertainty arising from want of evidence, *I*, 48.

raised by some implication, *X—Z*, 48.

words creating,—Example, *C, D*, 49.

Gifts with the certain words held not to create, *E—L*, 49.

Causing embarrassment and difficulty, *R*, 50.

Test as to existence of, *S*, 50.

Extent of interest taken, *T—W*, 51.

creation of—one of essentials, transferring trust property to trustee—Indian Law—English Law, *B—D*, 51, 52.

Extension of English principle to Hindu Law, *E, F*, 52.

Transmutation of possession, if necessary, *H—J*, 52.

Incomplete gift, whether can be construed as declaration of, *O—Q*, 53.

Court's power to construe imperfect gift as, *R—X*, 53, 54.

Mere promise not, *A*, 54.

Dootrine of transfer of ownership by acknowledgment of, if applicable to India, *B*, 54.

of moveables, *C*, 54.

Subsequent disposition by settlor—Effect, *G*, 55.

Execution of—Control of Court, *H*, 55.

Party setting up secret—Evidence, *I*, 55.

for benefit of absent Hindu, *J*, 55.

General rule as to who can create—English Law, *B*, 57.

declared by will—Constructive trust, *X*, 57.

Trust—(Continued).

- who may create, S. 7, pp. 57—61.
- Power of King to create, *C, D*, 58.
- Power of corporation to create—English Law, *E*, 58.
- Power of lunatics to create, *F—J*, 58.
- Power of bankrupts to create trust, *Q*, 59.
- Power of traitors, felons, and outlaws to create, *U*, 59.
- Power of married woman to create—English Law, *Y, W*, 60.
- What property may be transferred, *H'*, 61.
- Property not in actual possession, *G*, 61.
- Property inalienable by statute, *H*, 61.
- Pay, pensions etc. of military and naval officers—English Law, *I—M*, 61.
- Subject of, S. 8, pp. 61—63.
- Reason of S. 8, *X*, 63—English Law, *X*, 63.
- Property inalienable by reason of public policy, *N*, 62.
- Expectancies, *O*, 62.
- Title of honour, *P, Q*, 62
- of a recipe for making medicine, *R—T*, 62.
- of immoveable property without jurisdiction of Court, *U*, 63.
- of moveables situate in foreign country—English Law, *V*, 63.
- Ancestral property of Hindu joint family, *W*, 63.
- Presumption that infant takes not as trustee but as beneficiary, *B*, 67.
- No one bound to accept, S. 10, p. 65, *R, S*, 68.
- Acceptance of, S. 10, pp. 65, 69, 70.
- Custody of trust-deed, effect of, *F*, 69.
- may be inferred from long silence, *F*, 69.
- may be passive, *T*, 69.
- created by deed—Evidence of, *U*, 69.
- by express declaration, *V*, 69.
- Effect of, *W, X*, 69.
- by conduct, *Y*, 69.
- Examples of conduct that may lead to interference of, *Z, A—D*, 69.
- Effect of lapse of time, *G*, 70.
- of proof of will, *H*, 70.
- includes all the trusts, *I*, 70.
- Disclaimer of, S. 10, pp. 65, 70—72.
- principle as to, *J*, 70.
- Mode of, *K*, 70.
- by deed, *L*, 70.
- by conveyance to accepting trustees, *M—O*, 70.
- by conduct, *P*, 70.
- by counsel at the bar, *Q*, 70.
- orally or by written declaration, *R*, 71.

Trusts—(Continued).

- Disclaimer by renouncing probates, *S*, 71.
- partial, by renouncing probate, *S—U*, 71.
- delay in, effect of, *V—X*, 71.
- costs of—English practice, *Y—C*, 71, 72.
- Trustee to execute, *S*. 11, pp. 72—80.
- Essentials for creation of, *E—G*, 73.
- Author cannot modify, once created, *W*, *A*, 77.
- method of investing, fund—lease where subsequent consent valid, *C*, 78.
- Case where all interested parties are not before Court, *L*, 79.
- Whether Small Cause Courts could enforce, *M*, *N*, 79.
- undertaken must be performed even at the risk of becoming personally liable
Z, 92.
- improvements by receiver with sanction and consent—Life-tenants and re-
mainderman, rights of, *re*, the sum spent, *M*, 110.
- Express, necessary for charging compound interest, *N*, *O*, p. 146.
- Breach of, several trustees involved in,—Practice as to costs, *J*, *K*, 157.
- proper expenses in respect of execution of, *P—L*, 165—168.
- Void—Expenses—Right of trustees, *V*, *W*, 167.
- Voluntary—, setting aside of—Trustee's right to expenses, *X*, 168.
- Power in instrument of, in respect of increasing the number, how far Court bound
by, *L*, 317.
- breach of, liability of gainer by, *N*, 173.
- breach of, by beneficiary his liability to trustee *O—Z*, 173—174.
- property, management of : right of trustee to apply to Court for opinion in respect
of, *C—J*, 175 and 176.
- Public, charitable, and constructive—Whether *S*. 34 applies to, *X*, 176.
- business, completion of . settlement of accounts of trustee, *O*, *P*, 180.
- express trust settlement of accounts of trustee under *S*. 35—Release under seal
X, 181.
- by parol kind of acknowledgement by beneficiary under *S*. 35 Release, *Y—A*,
181.
- Simple—Powers of trustees, *I*, 183.
- Special—Trustee's powers, *J—L*, 183.
- indefinite—Notice to *cestui que trust* Trustee's liability, *O*, 183.
- property, how sold, *F—R*, 194, 195
- sale of —property, Court's decision in doubtful cases, *S*, 195.
- breach of, by sale of the estate, *G*, *H*, 198.
- raising money by sale of estate—Effect, *G*, *H*, 198
- property, sale of transfer for, *R—C*, 201, 202.
- estate, time for disposal of, *R*, *S*. 201.
- estate nature of direction to sell with all convenient speed, *T—W*, 201, 202.
- settlement provision for receipts by trustee—Effect of, *A*, 206.
- settlement provision for giving receipts by—omission of effect of . reasons
X—Y, 206.

Trusts—(Continued).

for payment of debts—Duty of purchasers—Common law principle : modification by statute, *M—R*, 207, 208.

for sale . one of beneficiaries abroad ; trustee's power to give receipts, *S*, 208.

for sale : nature of receipt by trustee, *B*, 209.

Religious—one trustee giving receipts . effect of such receipts, *L*, 209.

a joint office, reason, *Q*, 211.

for conversion of estate into money : disagreement between trustees, *R*, 211.

for payment of debts creation : generally irrevocable—how to be paid : time-barred debts : *P—IV*, 214

for creditors who come in within certain time, *X*, *Y*, 214.

for payment of debts : payment to creditors how made *G*, *H*, 218.

Survivorship of—Power of appointment of new trustees in settlement, *A—F*, 223.

Devolution of—office . Death of survivor, *G*, 223.

funds, investment of, *Q*, 225.

acceptance of, *G—L*, 227.

what amounts to acceptance of, *G*, 227

Non-disclaimer within reasonable time presumes a ceptance of, *H*, 227.

Religious—Assignment . Delegation ? If either valid, *Z*, *A*, 229.

How—money to be sent to foreign place, *M*, 230.

Public and private, *P*, 232.

a joint office, *Z*, *A*, 232.

Charitable, *K*, 233.

for sale—Acceleration of trust - consent of beneficiaries. *U*, *P*, 248.

Rectification of—Suit by representatives of testator, *A*, 249.

not to fail for want of trustee, *N*, 282.

Right to sue for execution of—*S*. 59, pp 262, 263.

Author's intention carried out *W*, 263.

Court executing its power retrospectively, *X*, 263

Court, carrying, though difficult, *Y*, *Z*, 263.

Trustee's non-execution not prejudicial, *A*, 263.

Mode of execution, *B—E*, 263.

(a) If settlor has prescribed a rule, Court will adopt it, *D*, 263.

(b) Procedure of Court in absence of rules by settlor, *C*, 263.

(c) Trust not permitting equal division —Procedure, *D*, 263.

(d) General intention when will be carried out, *E*, 263.

Petition to be discharged from office of, *S*. 72, pp. 305—307.

Suit for administration of—Appointment of new trustees—Sanction of Court necessary, *Z*, *A*, 314.

Survival of, *S*. 76, p. 323.

Survival of—Power in settlement for restoring original number on death of trustees,—Effect of, survival of, on, *M*, *N*, 323.

Trust estate passes to survivors among joint trustee, *O*, *P*, 323.

Trusts—(Continued).

Power vested in two trustees jointly, not exercisable by either of them singly, *Q*, 323.

of the extinction of, Ch. VIII, Ss. 77-79. pp. 323—327.

how extinguished, S. 77, pp. 333—324

Scope of section, S. 77, *K* 324.

Complete fulfilment of purpose of trust—Effect, *S*, 324.

Revocation of, S. 78, pp. 324, 327.

Irrevocable, *X—Z*, *A*, p. 325.

Existence of debt—Assurance, *X*, 325.

Form which assurance assumes, *Y*, 325.

Trustee himself creditor—Deed irrevocable, *Z*, 325.

Creditor not party to deed—Enforcement of, *A*, 325.

Revocable, *B—H*, pp. 325, 326.

when revocable, *B*, 325.

Revocation not to defeat what trustees have duly done, S. 79, p. 326.

Revocation of—Voluntary settlement on, irrevocable, when once acted on, *I*, 326.

Even when property becomes re-vested in settlor, *J*, 326.

Voluntary trust subject to payment of settlor's debts, revocable in effect, *K*, 326.

Voluntary settlement, *L*, 327.

Revocable—Revocation—Conditions, payment of amount to trustees, *U*, 326.

for benefit of creditor, when ceases to be revocable, *D*, *F*, 324

Right to revoke being personal, not exercisable by representative of settlor, *F*, 326.

Onus on creditors to establish irrevocability of, in their favour, *G*, 326.

not enforceable after another's death, *H*, 326.

of certain obligation in nature of, Ch. IX, Ss. 80-96, pp. 327—353.

Scope of Ch. IX, *N*, 327.

Obligation in nature of—Where it does not appear that transferor intended to dispose of beneficial interest, S. 81, pp. 327—331.

Scope of S. 81, *O*, 328.

General rule, *P*, 328.

Other rules, *W—Z*, *A*, 330.

Where obligation in the nature of, is created, S. 80, p. 327.

Principle of resulting, *Q*, 328.

Way by which, result, *B—J*, 330.

By presumption, *B*, 330.

From intention expressed, *C*, 330.

Where no trust is declared on any part, *D*, 330.

Where trust is declared of part only, *E*, 330.

Mistakes, *F*, 330.

Fraud and *mala fides*, *G*, *H*, 330.

Vagueness in instrument, *I*, 330.

Trusts—(Concluded).

Illegality of, *J*, 330.

Resulting—Exceptions under English Law, *N—R*, 331.

Charities, *N*, *O*, 331.

Presumption of advancement, *P*, *Q*, 331.

Trust for—marriage settlement, *R*, 331.

incapable of execution, or executed without exhausting trust property, *S*, 83, pp. 333—336.

Such incapacity may be due to—Vagueness, *F*, 334.

Being void for unlawfulness, *G*, 334.

Failing by lapse of time, *H*, 334.

Unexhausted residue—other cases, *J*, *K*, 334.—Exception under English Law—charities, *L*, 334.

Declaration of, invalid—Resulting, *M*, *N*, 335.

to whom results—English and Indian law, *T*, 336

property settled with unlawful purpose, *Y—Z*, *A—F*, pp. 336—337.

partly lawful and partly unlawful, *G—I*, 337.

Effectuation of unlawful object, *O*, 338.

for religious purposes—Invalidity—Recovery by heirs—Limitation, *P*, 338.

Purchase by person contracting to buy property to be held on, *S* 92, p. 351.

Trust Act, Necessity for, *A—D*, 1.

how far based on pre-existing law, *I—J*, 2.

Applicability of the Act, *K*, *L*, 2.

Local extent why limited, *N—P*, 3, 4.

Applicability of, to Bombay, *Q*, 4.

Applicability of, to Rangoon, *R*, 4.

Trust and power Mixture of, *T*, 15.

How distinguished from trust with power annexed, *U*, 16.

Trustee, Manager of a joint Hindu family, not a trustee, *B—E*, 5, 6.

Hindu woman succeeding to estate of male not, for those who come after her, *J—L*, 5, 7.

Difference in condoning maladministration by—Public and private trusts, *E*, 9.

as defined in Specific Relief Act, *E*, 17.

as defined in Limitation Act, *F*, *G*, 17.

Qualification of, *H*, 17.

Whether, is to be named—English Law, *A*, 51.

Failure of—Rule of English Law, *X—Z*, 51.

Owner, when constitutes himself, for another, *L—N*, 53.

holding for benefit of legal representative—Evidence, *K*, 55.

Devisee as—English and Indian Law, *Y*, 56.

Qualification of, *N—Q*, 55, 56.

Who may be, *S*, 10, pp. 55—58.

can Sovereign be, *R—U*, 66.

Secretary of State for India,—Government, *V—W*, 66.

Bank of England whether can be, *X*, *Y*, 66.

Trustee—(Continued).

Infants whether can be, *Z*, 66.

Infant cannot be guilty of breach of trust, *A*, 67.

Feme covert,—English Law, *C, D*, 67.

Who may be—Life convict, *R*, 67.

Bankrupt not absolutely disqualified to be, *P*, 67.

Cestui qua trust, whether can be, *G, H*, 67.

Trusteeship with power to appoint successor, *I*, 67.

Care to be taken to secure adequate number of, *J*, 68.

Executor *de son tort*, *K, M*, 68.

acting ambiguously, *U*, 71.

To execute trust, *S*, 11, pp. 72—80.

Duties and liabilities of, *Ch. III*, *Ss. 11—30*: pp. 72—80.

Meaning of, *H*, 73.

Objection to, *I*, 73.

Suit for declaration that defendant's act is not lawful, nature of, *J*, 73.

cannot set up adverse title, *K, L*, 73.

de son tort, *M, N*, 73.

to execute trust according to its directions, 74, 75.

to assume validity of trust, *G*, 75.

not to be passive, *H, I*, 75.

but may wait till fully appointed, *J*, 75.

to satisfy himself about beneficiary entitled, *K*, 76.

sued for breach entitled to benefit of debt, *L*, 76.

corpus of trust estate, if can be sold for decree against, personally, *M, N*, 76.

estimate of—'s conduct how made, *O*, 76.

discretion of, as to expenditure, *P, R*, 75, 76.

extent of his power, *S*, 77.

duty of, and persons having notice of trust money, *T*, 77.

Procedure where surviving, cannot easily manage, *U*, 77.

Solicitor advising breach of trust—Effect, *V*, 77.

Court may solve questions between, and others without administering trust, *J*, 79.

duty of, for sale, *L*, 79.

to inform himself of state of trust property, *S*, 12, pp. 80—84.

should make enquiries as to property, the trusts and trust documents, *B—D*, 81.

should find out if property is well invested, *E*, 81.

not liable for predecessor's breaches, *F*, 81.

but, should make inquiries as to acts of predecessors, *G—I*, 81, 82.

exception, when such inquiry need not be made, *J—K*, 82.

effect of not searching for notices of incumbrances, *L*, 82.

reason for, not being liable after due search, *M, N*, 82.

Trustee—(Continued).

must not allow property to remain under sole control of co-trustee, *O, P, 82.*

should make inventory of chattels settled in trust, *Q, 82.*

suing for protection of trust property under legal advice if indemnified against costs, *R, 83.*

should get in any outstanding fund, without delay, *T, 83.*

even though loan was made by author of trust, *U, 83.*

exception to this rule, *V, 83.*

Whether liable for subsequent depreciation of unauthorised investments, *W, 83.*

should invest monies as soon as possible, *X, 83.*

to act gratuitously, *Z, 84.*

Exceptions, *A - F, 84.*

funds outstanding on personal security to be recovered by suit, *F, 84.*

Even if debtor is co-trustee, *G, 84.*

to protect title to trust property, *S, 13, pp. 84—90.*

No obligation to sue, if suing useless, *H, 85.*

to prove suit would be useless, *I, 85.*

Solentor's advice will no excuse, failing to recover trust fund, *J, 85.*

nor the fact that debtor's credit may be injured, *K, 85.*

Each instalment due to be sued for, *L, 85.*

may bring action for proofs against stranger, *M, 85.*

recovery of property not lost——'s by default, *N, 85.*

to maintain and defend all necessary actions, *Q, 86.*

but such acts must be reasonable and proper, *R, 86.*

must generally consult the Court, *S, 86.*

may move to appoint receiver for repairs, *U, 85.*

but should not sign receipts before actually receiving money, *V, 85.*

confidence reposed in, is consideration enough to make him liable, *W, 86.*

rule of conduct for gratuitous, *X, Y, 86.*

Some rule for paid, *Z, A, 87.*

to be deliberate and cautious in administering trusts, *B, 871.*

but should, not elaborate but reasonable precautions, *U—F, 87.*

liable duly for gross negligence, *G, 87.*

test of——'s liability, *H, I, 87.*

duty to safely invest trust funds, *J, 87.*

not to allow trust funds to be outstanding on personal security, *K, 88.*

even where they are not regularly appointed, *L, 88.*

Debts to be soon reduced to possession, *M, 88.*

Procedure where whole debt cannot be recovered, *N, 88.*

When securities should be realised, *P, Q, 88.*

Testator's approval of security no reason for, continuing it, *R, 88.*

Reason, *S, 88.*

Liable for loss due to debtor's insolvency or extinction by limitation, *U, 89.*

Trustee—(Continued).

- Duty to enquire if securities are safe, *V*, 89.
- Mode of protecting deeds and security, *W*, 89.
- Title deed suffered to remain with indebted co-trustee, *X*, 89.
- 's solicitor may keep title deeds, *Y*, 89.
- to protect property by due registration, *Z*, 89.
- to investigate title of property brought by them, *A*, 89.
- to protect property from being wasted, *B*, 89.
- but, need not make repairs, *C*, 89.
- not bound to insure against fire, or continue such insurance, *D*, 89.
- notice to be given to office, of settlement in life insurance cases, *E*, 90.
- when entitled to expenses, *F*—*J*, 90.
- to consult Court in doubtful cases, *K*, 90.
- English Law—Procedure for obtaining advice of Court etc, *L*—*S*, 90.
- must assume the validity of trust, *T*, 91.
- cannot himself set up title to trust property, *U*, *V*, 91.
- nor can, set up a third party's title against trust, *W*—*J*, 91.
- not to set up title adverse to beneficiary, *S*, 14, pp. 91—93.
- may invoke Court's discretion without performing trust, *A*, 92.
- Arrangement between, and *cestui que trust*, *E*, 93.
- Case under English Mortmain Act—Where action against, was barred, *F*, 93.
- Care required from, *S*, 15, pp. 93—101.
- should take reasonable care, *G*—*K*, 94.
- Test of reasonable care, *L*, *M*, 94.
- acting under legal advice is evidence of diligence, *N*, 94.
- whether bound to transact *benam* personally—Delegation, *O*, 95.
- When, liable for agent's default, *P*, 95.
- Trust property stolen by—'s servant, *Q*, *R*, 95.
- Distinction between criminal act of strangers and an act by agent appointed by, himself, *S*, 95.
- Reasonable care of articles whose ownership passes by delivery, *T*, 95.
- Bad faith in, *U*, 96.
- Proof of bad faith, *V*, 96.
- to invest money not applied to trust purposes, *W*, 96.
- Case where investment was defined, *X*, 96.
- for purchase, *Y*, *Z*, *A*, *B*, 96.
- duty to evaluate property correctly, *Y*, 96.
- to secure marketable title, *Z*, 96.
- Legal estate to be secured, *A*, 96.
- never to speculate without ready money, *B*, 96.
- not to insist on beneficiary giving release before delivery of trust property to him, *C*, 97.
- Custody of deeds, *D*, 97.

Trustee—(Continued).

to guard against improper use of bonds, *E*, 97.

non-negotiable securities, custody of, *F*, *G*, 97.

Custody of stocks—Case where less elaborate precautions held sufficient, *H*, 97.

Debts to be realised speedily, *I*—*K*, 97, 98.

Releasing or compounding debts, *L*, 98.

bound to keep money in reliable banks though not to his own credit, *M*, *N*, 98.

must not keep it in deposit longer than necessary, *O*—*Q*, 98.

Trust fund must not be placed beyond—'s control, *R*, 98.

Liability of, for keeping money in bank where it must not be placed. *S*—*W*, 98 99.

Indemnity clause will not save, *X*, 99.

When not liable for failure of bond, *Y*, 99.

whether bound to realise a deteriorated investment, *Z*, 99.

must not join in contributory mortgage, *A*, 99.

depositing money payable to either of co-executors, *B*, 99.

loan to co-trustee, *C*, 99.

loan not to be given on mortgage to one of several trustees, *D*, 99.

not competent to assent to condition not to demand money lent on mortgage, *E*, 100.

for sale relying entirely on co-trustee, *F*, 100.

for sale, *G*—*I*, 100.

competition to be invited, *G*, 100.

Expert should be employed for correctly estimating property, *H*, 100.

option to purchase in future never to be given to intending purchasers, *I*, 100.

Joining in sale with strangers, *J*, 100.

Mixing trust property with private property, *K*, *L*, 100.

Insurance, *M*, 101.

letting vacant property etc., *N*, 101.

suffering rents to get into arrears, *O*, 101.

covenants of settlor to be enforced, *P*, 101.

repair, duty to, *Q*, 101.

Assignment perfect only after notice given to, or debtor, *R*, 101.

Discretion given to, as to time of sale, *P*, 107.

Direction to sell with all convenient speed, construction of, *S*, 107.

to be impartial, *S*, 17, pp 108—111.

S 17, explained, *B*, 109.

Scope of *S*, 17, *C*, 109.

Powers of sale and purchase—Life-tenant not to be unduly preferred, *D*, *E*, 109.

Trusts to raise debts by sale of land—Interest of life-tenant not to be unduly sacrificed, *F*, 109.

Purchase of woodland estate, *G*, 109.

Purchase of mining property, etc., *H*, 109.

not to be swayed by moral consideration and deviate from trust, *I*, 109.

Trustee—(Continued).

- not to pay one beneficiary before paying others, *J, K, 109.*
- must not exert influence against interest of beneficiary, *I, 110.*
- having choice of investment, *N, O, 110*
- Discretion of, not to be interfered with, *P, 110.*
- Reason of the above rule, *Q, R, 110.*
- Examples of discretion of, *S—V, 110, 111.*
- to prevent waste, *S, 18, 111—114.*
- Scope of *S, 18, W—Y, 111.*
- Rule in *S, 18, explained, Z, A, 111.*
- Duty of, to sell wasting and reversionary property—Reason of rule—English Law, *B—E, 112.*
- not to destroy account books, *D, 114.*
- mixing trust accounts with his own, *E, 114.*
- sanctioning, rendering of improper accounts, *F, 114.*
- bound to keep clear and accurate accounts to furnish beneficiary full and accurate information, *S, 19, 114—116.*
- S, 19, explained, B, 114.*
- Principle of *S, 19* applied to agents, executors and receivers, *C, 114*
- Entitled to vouchers after execution of trust, *H, 115.*
- Refusal of, to account—Costs of suit, *I, 115.*
- Chicanery of—Costs, *J, 115.*
- liable to costs if accounts kept in confusion, *K, 115.*
- liable to costs, if contrary established to denial of assets, *L, 115.*
- Taking account against—His good faith to be established, *H, 115.*
- is entitled to professional assistance, *O, 115.*
- must keep accounts, *P, Q, 115.*
- what kind of information to be supplied, *S—U, 116.*
- not to invest in personal security, *R, F, 118.*
- even if larger interest is obtainable, *G, 118.*
- even if there be joint security of several obligors, *H, 118.*
- even to one to whom testator himself lent on personal security, *I, 119.*
- not to accommodate person, *J—M, 119.*
- lending should not employ the same solicitor as the borrower, *R, 119.*
- must not engage not to realise for a long period, *S, 120.*
- tenant for life not to be favoured in *N, 119.*
- in trade, *O—Q, 119.*
- bound by directions of settlor, *V, 120.*
- if expressly empowered, may lend on personal security, *W—Z, 120.*
- condition annexed to the power must be strictly observed, *A—E, pp. 120, 121.*
- Trustees may not lend on mortgage to one of themselves, *G, 121.*
- existing mortgages, *H, 121.*
- Mortgage of undivided share or of reversion, *I, 121.*
- not advised to advance on second mortgages—English Law, *J, 121.*

Trustee—(Continued).

Sale by, directed to sell within specified time, S, 22; Burden of proof, 122, 127.

For sale, to sell most advantageously for beneficiaries, R, 123.

liable for missing condition of property, S, 123.

practice regarding sales—Beneficiary's conditional contract, U, 123.

not bound to assent to *cestui que trust's* choice of offers, V, 123.

cannot mortgage, W, X, 123.

not to grant leases, Y, 123.

Court will not cancel *bona fide* contract because another offer high price, Z, 123.

Trustees severally responsible for sale, B, 124.

responsible for improper delay, I, 124.

Liability for breach of trust, S, 23, 127–148.

Measure of liability of, K, L, 129.

liable for breach of trust," V, 130.

liable even if no consideration, W, 130.

Immaterial, if, gains no benefit by breach, X, Y, 130.

Causing loss and gains to trust, Z, 130.

Fraudulent inducement by, A, 130.

Liability of, for accidental losses, D, E, 131.

Liability of, for being misled by forgery, F, G, 131.

Liable for losses and deterioration due to not obeying directions in trust deed, H, I, 131.

Neglect to pay premium—when and how liable, J, 131.

Insurance, liability of, with references to, K—M, 131.

Non-conversion of trust estate, liability for, N, 132.

Time for realisation and conversion, O—R, 132.

Property of wasting and perishable nature to be immediately converted, S, 132.

Express power to retain, effect of, T, 132.

trustee's, liability, extent of, U—W, 133.

Defaulting, not exempt from liability by retining, Y, 133.

Estimate of liability of, for breach, Z, 133.

Cases where, liable for more than he received, A, B, 133.

Proof of conditions, C, 133.

Third person acting as, not liable for breach, O, 134.

Strangers when liable as, P, 134.

Strangers when not liable as, Q, 134.

When trustee liable for their agents and when agents themselves liable, T—V, 135.

Breaches by, of charities, *W, 135.

Bankruptcy of, X, Y, 135.

Reason why limitation is no bar to suit against express, S, 138.

When, presumed to have received interest, W, 144.

When, need not pay interest.

Trustee—(Continued).

Active calling in of trust moneys for embarking them in trade necessary for charging compound interest, *F*, 146.

Partner, employing trust funds in trade, *Y, Z*, 147.

No set off allowed to,—*S. 24*, 148, 149; section explained, *J—M*, 148, 149.

Non-liability of, for predecessor's default, *S. 25*, 149, 150.

Inquiries as to acts of predecessors, *R, T*, 150.

Non-liability for co-trustee's default, *S. 26*, 150—154; section 26 explained, *U*, 150; Reason for rule in *S. 26*, *V—X*, 151.

Protection against acts of co-trustees—English Law, *Y, Z. A—C*, 151, 152.

Negligence of trustee, *D—H*, 152.

Fraud of, *I*, 152.

must not put an end to trust funds out of his control, *J—L*, 152.

must prevent threatened breach of trust, *M, N*, 153.

Liability of Hindu, before the Act, *O*, 153.

Liability of, when he allows trust property to be received by co-trustee, *P*, 153.

Liability of, when he knows of intended breach by co-trustee, *Q—S*, 153

joining in receipt for conformity with co-trustee, if liable, *T—Z, A, B*, 153, 154.

joining in receipt, rule as to, *T*, 153.

joining in receipt, reason for the rule as to, *U*, 153.

joining in receipt, application of the rule as to *Y, Z*, 154.

joining in receipt must not permit money to be with co-trustee, *A, B*, 154.

Joint liability of, excluded by express contract, *D, E*, 155.

representatives of deceased, liability of, *L—N*, 155, 156.

if liable, when benefited incidentally, *O, P*, 156.

breach of, committed at instigation, request or with consent of beneficiaries—
Liability of trustees, *L*, 157.

One—solely chargeable when he takes more active part in breach, *Z—L*, 157,

Indemnity of, 158.

paying without notice of transfer by beneficiary—Non-liability of, *S. 28*, 158.

liability of, when beneficiary's interest forfeited to Government, *S. 29*, 158,
reason for the rule, *N*, 158.

Bonds to bearer—One half by each of two trustees—Absconding of one—Liability of other, *U*, 162.

Securities held by—who is a debtor to estate, *V*, 162.

liability of, for not taking precautions as to protection and deposit of title deeds, *A*, 163.

right of, to reimbursement of expenses and to recoupment for erroneous overpayment, *F—M*, 163—172.

right of, to reimbursement—General rule, *G*, 164.

right of, to reimbursement when trustees have been wrongfully appointed, *H*, 164.

under settled Land Act, 1882—Reimbursement, *I*, 164.

whether entitled to interest or costs, *M, N*, 164.

debts due by—, set-off of, *O*, 164.

Trustee—(Continued).

- right of, to expenses—Nature of such expenses, *P*, 165.
- if entitled to travelling expenses, *Q*, 165.
- employing solicitor, if entitled to expenses, *R*, 165.
- right of, to expenses incurred properly, *S*, *T*, 165.
- right to expenses—what are and what are not proper expenses, *U—I*, 165, 166.
- employing one of themselves as solicitor—Liability, *J*, 166.
- if, may give fees to counsel, *K*, 166.
- whether entitled to costs of opposing a Bill in Parliament, *L*, 166.
- right of, to extra costs, *M*, 166.
- if entitled to costs in defending his conduct in administering trust, *N*, 166.
- if entitled to allowance for expenses besides remuneration, *O*, 166.
- extraordinary expenses—, if trustee is entitled to, *P*, 167.
- if entitled to costs paid by him to attorney or solicitor, *Q*, 167.
- Employment of agent by, costs, *R*, *S*, 167.
- Debts incurred by—Right of indemnity—Creditor's right to stand in place of trustee, *T*, *U*, 167.
- Advance to—by *cestui que trust*—latter's right, *Y*, 168.
- agent of—, if liable to account, *Z*, 168.
- agent of—if liable as trustees *de son tort*, *A*, 168.
- of two estates—Incurring expenses in respect of one estate—His right to recoup it from the other, *B—D*, 168.
- right of, to out of pocket expenses, *E*, 168.
- to keep account of expenses, *F*, 168.
- if failure to keep account by—affects his allowance, *G*, 168.
- expenses incurred by—a lien on estate *H*, 169.
- Lien of—when paid. Nature of lien—how enforced, *I—M*, 169.
- right to indemnity of—when enforced, *N*, 169.
- carrying on business—Lien on trust property, *S*, 170.
- Right of creditors of, *T*, 170.
- Right of creditors of—subject to equities, *U*, 170.
- in default—Right of creditors—indemnity, *V*, 170.
- for sale unauthorised—Right of creditors, *W*, 170.
- one of trustees in default—Right of other trustees, *X*, 170.
- one—in default—Right of creditors, *Y*, 170.
- acts done in excess of powers by—lien, *C*, 171.
- right of creditors of—by subrogation, *D*, 171.
- mode of realising amount due to, *E*, 171.
- right of, as against beneficiary personally if property fails, *F*, 171.
- right of, against trust estate when lost, *G*, 171.
- right of, to payment of expenses—Funds, *H*, 172.
- if, has right to proceed against settlor when the latter is not beneficially interested, *I*, 172.
- right of, to indemnity from beneficiaries personally, *J*, 172.

Trustee—(Continued).

- Conditions for personal liability of beneficiary to, *K*, 172.
- suit by, for recovering expenses : Frame of, *L*, 172.
- Repairs by—Opinion of Court, *D*, 175.
- Expenditure of moneys by—Court's sanction, *E, F*, 175.
- Permanent improvements by,—Court's sanction, *G, H*, 175.
- special powers of—Repairs: opinion of Court, *I*, 176.
- taking advice of courts under S. 34—married woman, *W*, 177.
- when to take Court's sanction under S. 34—Reasons, *X*, 177.
- soliciting sanction under S. 34; his right to take out summons—summons how taken under English Law, *H—J*, 179.
- requiring Court's opinion under S. 34, judge's power, *K*, 179.
- asking for Court's advice under S. 34, persons to be served—Court's discretion, *L*, 179.
- Entitled to settlement of accounts on completion of trust business, *O—S*, 180.
- Settlement of accounts of—His liability, *Q*, 180.
- Discharge of—Court's order as to payment of amount by new trustee to old—account by old trustee—suit for recovering amount ordered, *S*, 180.
- right of, to release under S. 35, *C, D*, 181, 182.
- General authority of, *G—O*, 182, 183.
- Kinds of powers of, *G*, 182.
- Power of—at Law and equity, *H*, 182.
- for adults—Powers of, *M, N*, 183.
- May exercise powers under settlement, *P*, 183.
- Special powers of—Division of such powers, *Q, R*, 183, 184.
- impartiality of, *D, E*, 185.
- Liability of, for agent's acts—extent of liability, *T, U*, 186.
- necessity for joint action by trustees, *V, W*, 186, 187.
- powers of—when may be exercised after decree, *X*, 187.
- liability of, even after passing of decree, *Y, Z*, 187.
- may dispense with forms in respect of his actions, *A—C*, 187.
- when Court's sanction necessary for trustee's actions, *E, F*, 187.
- of leaseholds, rights and duties of, *F*, 188.
- Reasonable and proper acts of, *G—A*, 188—190.
- discretionary powers of—typical instance, *G*, 188.
- discretion of—limited to time and manner, *J*, 188.
- may exchange policy for a fully paid up one, *N*, 189.
- trustee's power to fell timber, *O*, 189.
- cannot lease to himself, *V*, 190.
- trustee's power to mortgage, *W*, 190.
- not to make speculative improvements, *X—A*, 190.
- Acts by,—realization, protection, or benefit of estate, *X—J*, 192—1
- trustee's power to allow maintenance for infants, *Z*, 193.
- payment of maintenance by—source, *A, B*, 193.

Trustees—(Continued).

power of—to give larger sum for maintenance, *C*, 193.

power of—to give maintenance in absence of provision therefor, *D*, 193.

power of—to award part maintenance, *E*, 193.

Control of Court over—*K*, *L*, 194.

powers of, when Court can interfere with, *M*, 194.

trustee's power to sell in lots and by auctions, public and private, *H—S*, 194—199

trustee's power to sell without applying to Court, *T—V*, 195

cannot delegate sale, *W—Y*, 195.

trustee's power to sell in lots, *Z—C*, 195.

trustee's sale to be advertised, *D*, 195.

trustee's sale to be advantageous, *E*, *F*, 196.

trustee's sale—attendance of bidders, *I*, *J*, 196.

trustee's sale—property to be valued before sale, *K*, *L*, 196.

trustee's sale—Expense of proper valuation of property to be charged on estate, *M*, 27.

trustee's sale at gross inadequate value, *N*, 196

death of one of—several of trust for sale, *O—R*, 196

trustee's sale where beneficiary is *suu juris*, *S*, *T*, 197.

trustee's sale—mis-statement as to condition of property—Reduction in price—

Position of purchaser, *U*, *V*, 197.

bona fide sale by—offer of higher price—Effect of, *W*, 197.

responsibility of each, in sale, *A*, 197.

Injunction to restrain improper sale by, *B*, 197

trustee's sale—offer on equally advantageous terms—if *cestui que trust's* man can be preferred, *X*, 197.

for sale for payment of debts, bound to answer enquiries, *Y*, 197.

for sale cannot grant leases, *L*, 198.

for sale, if can give underlease, *N*, 198

for sale cannot give lessee option to purchase, *O*, 198

for sale, if has power to mortgage, *P*, *Q*, 199.

for mortgage, cannot sell, *R*, 199.

for sale, cannot authorise partition, *S*, 199.

trustee's power to sell under special conditions, *U—J*, 199, 201.

sale by—, conditions of, *V—Z*, 199, 200.

sale by—objection to title—time, *A*, 200.

contract by—, involving hardship if enforceable, *B*, 200.

sale by—trustee to give good title—exceptions, counsel's opinion—covenant—clearing title—right of purchaser to set aside, *C—J*, 200, 201.

power of, to buy in and re-sell, *K—Q*, 201.

sale by—reserve price, *L*, 201.*

when can buy in, *M*, *N*, 201.

to be careful in re-sale, *O*, 201.

delay in re-sale by—his liability, *P*, 201.

of bankrupts, *Q*, 201.

Trustee— (Continued).

- Neglect of—to sell—liability, *X*, 202.
- cannot sell at future time, *Y*, 202.
- sale by—delay—smaller sale proceeds, *Z*, 202.
- Direction as to sale by—*A*, 202.
- proper exercise of declaration by—test, *B*, 202.
- Change of investments by, *M*, 204
- selling out stock, *N*, 204.
- change of investments by—consent of person entitled to income of estate, *O*, *P*, 204.
- trustee's power to give receipts, *W—I*, 206, 207.
- provision for giving receipts by—, *W*, 206.
- trustee's receipt—all must join, *Z*, 206.
- a married woman—power to give receipt, *B*, 235.
- Wife (*a*—)—husband's concurrence if necessary for wife's receipt, *C*, *D*, 206
- payment to one—validity, *E*, 206
- receipt from one of several trustees—insufficiency, *F*, 207.
- trustee's receipt, effect of, *J—L*, 207—209.
- purchaser from—Duty of English Law control by intention of settlor, *J—L*, 207.
- disclaiming—, need not join in receipt of trustees, *C*, 209.
- must act together, *N—M*, 210—213.
- must act jointly with other trustees, *N*, 210.
- Majority of trustee's cannot bind minority, *O*, 210.
- Act of one—when binding on others, *P*, 211.
- Receipt of trustees, to be joint, *S*, *T*, 211.
- payment to one—notice of trust—Effect, *U*, 211.
- Investments in joint names of—, *S*, *V*, 211.
- Proving of debts by trustees, *W*, *X*, 211.
- trustee's to sue jointly, *Y*, 212.
- Severance of trustees, *Z—C*, 212.
- Exceptions to joint action of trustee, *F—N*, 212, 213.
- acceptance of composition by—Onus to prove *mala fides*, *N*, *O*, 213
- Assent of trustees for compromise, *H—J*, 213.
- trustee's power to compromise under conveyancing Act and Lord Cranworths Act, and Trustee Act—Nature of, *K*, *L*, 216.
- Compromise by trustees, to be *bona fide* to be entered into by all : Court's sanction compromise on behalf of infants, lien of next friend Court's approval of compromise : Court's approval when some persons interested are absent procedure in cases of compromise when *cestui que trust* minor assent of next friend of minor beneficiary, *M—X*, 216, 217.
- compromise effected by—when allowed *Y*, *Z*, 217.
- trustee's power to compromise—position as, attacked, *A*, 217.
- Arbitration effected by—his liability, *C*, 218.

Trustee—(Continued).

- Admission of creditor's claims by—Discretion, *F*, 218.
 trustee's power to release or compound : mortgages *I—K*, 218.
 Suspension of trustee's powers by decree, *II—F*, (224—226).
 Decree in administration suit, effect of on trustee's powers, *H—J*, 224.
 Injunction (before judgment), and appointment of receiver in administration suit, effect of on trustee's powers, *K—L*, 224.
 Administration action : Discretionary power in trustees : Non-interference by Court, *M*, 224.
 trustee's actions without sanction of Court after judgment in administration suit : his liability, *R*, *S*, 225.
 trustee's transactions with third parties, after judgment in administration action : title of third parties, *T*, *U*, 225.
 Payment of money into Court trustee's powers, *V—IV*, 225.
 liable to convey estate even after the beneficiary recovers, *N*, 227.
 cannot delegate, *O—A*, 228, 229.
 Delegation by trustee—Rule in respect to, *O—R*, 228.
 Following testators directions if liable, *B*, 229.
 Delegation by— when allowed, *D—R*, 229, 230.
 Could appoint debt collector to collect debts, *K*, 230.
 need not take security for agent, *I*, 230.
 employing agent—Insolvency of agent—*Onus probandi* *N*, *O*, 230.
 trustee's liability for allowing trust moneys in bank for unreasonably long time, *P*, 230.
 investments by—Maximum time for, *Q*, 231.
 employing agent cannot give full power to him *R*, 231.
 mere conveyance of estate by—Effect of *U*, *V*, 231.
 Disabilities of—Co-trustees cannot act singly, *S*, 48, 231—233.
 Rule involved, *X*, 231.
 Principle of *S*, 48, *Y*, 231.
 Effect of refusal of one, to join, *B*, 232.
 Act of one, *C*, *D*, 232.
 Duty of Court where there are numerous trustees, *E*, 232.
 Joint action in receipts for money, *G*, 232.
 All trustees must prove, *H*, 232.
 Disabilities of—Control of discretionary power, *S*, 49, 233, 234.
 Principle involved in section 49, *T*, 233.
 Discretion of—Investments—No control, *U*, 234.
 Discretion of—Maintenance to children—No control, *V*, 234.
 Object of trust—No control, *W*, 234.
 not to give reason —If they give reasons, Court could scrutinize, *X*, 234.
 Court's power to supervise, where, is before it, *Z*, 234.
 Disabilities of—May not charge of services, *S*, 50, 234—238.
 Rule embodied in section, *B*, 235.
 Reason for the rule, *C*, *D*, 235.

Trustee—(Continued).

Scope of section, *E*, 235.

Allowance to, by settlor, *F*, 235.

Reference in cases where, amount is not fixed, *G*, 235.

Such allowance not to cease on the institution of suit, *H*, 235.

Contract for allowance with *cestui que trust*, *I*, 235.

How Courts view such contracts, *J*, 235.

How such contracts to be entered into, *K*, 236.

Fulfilment of such contracts, *L*, 236.

Solicitor—, *P—S*, 236.

carrying-on trade, *W*, 237.

cannot be receiver, *X*, 237.

may not change for services—Exception to, *Y, Z, A—E*, 237, 238.

May appoint Collector of rents, *Y*, 237.

may appoint bailiff, *Z, A*, 237.

could employ agent, *D*, 238.

Disabilities of—may not use trust property for his own profit, S. 51, pp. 238, 239.

Principle of S. 51, *F*, 238.

Exception to the general principle, *G*, 238.

Scope of S. 51, *H*, 238.

of lease hold, *I*, 238.

taking bribes, *J*, 238.

Commissions paid to, *K*, 238.

not to buy up debts for himself, *L*, 239.

Mortgagee, *M*, 239.

Retirement of—Consideration therefor, *N*, 239.

Carrying on trade, *O*, 239.

bargaining with beneficiary, *P*, 239.

Partner, *Q*, 239; Contra if trade not in fiduciary position, *R*, 239.

Joint purchaser, *T*, 239.

Setting up adverse title, *U*, 239.

But he need not deliver property, if title paramount exists elsewhere, *V*, 239.

for sale or his agent may not buy, S. 52, 240, 242.

Principle embodied in S. 52, *W—Y*, 240.

Reason for the principle, *Z*, 240.

Extent of the rule, *A*, 240.

Scope of the rule, *B—F*, 241.

may not lease to himself, *K*, 241.

The Court will not authorize, to bid, *I, M*, 241, 241.

may purchase from *cestui que trust*, *N*, 241.

How Courts view the transaction, *O*, 241.

What should be done before such transaction, *P*, 242.

Where *cestui que trust* is under disability, *Q*, 242.

Trustee—(Continued).

Purchase by surviving partner, *R*, 242.

Purchase by one executor from one another, *S*, 242.

Term on which sale will be set aside, *T*, 243.

for purchase—duty of, *S*. 53, 242—244, *Ss* 52 & 53 compared, *U*, 243; Indian and English Law, *V*, 243; Object of *S*. 53, *W*, 243; Scope of *S*. 53, *X—Z*, 243; Nature of transaction, *B*, 244, Exception to the rule, *C—H*, 244.

may not buy beneficiary's interest without permission, *S*. 53, 242—244; *Ss*. 52 and 53 compared; *U*, 243.

Indian and English Law, *V*, 243, Object of *S*. 53, *W*, 243.

Scope of *S*. 53, *X—Z*, 243, Nature of transaction, *B*, 244.

Exception of the rule, *C—H*, 244.

Co-trustees may not lend to one of the trustees themselves *S*. 54, 244, 245.

and beneficiary, rights of, *Z*, 246.

and *cestui que trust*—wrongful withholding *D*, *E*, 249.

refusing to transfer—Effect, *F—I*, 250.

Delay by, in the assignment of legal estate—Costs of suit and conveyance, *J*, 250.

for appointees, *X*, 251.

whether can insist on obtaining release, *E*, 252.

to keep himself with accounts, *X*, *Y*, 254.

Equitable mortgage, *C*, 259.

Equitable interest obtained by fraud, *D*, 259.

notice to—*J—O*, 259, 260.

Active and passive—, No difference, *S*, 260.

Case where there is no, *G*, 261.

dying during testator's life time, etc.—Effect, *O—T*, 262.

bound to execute, not permitted to use discretion, *U*, 262.

Death of, in testator's life-time—Right of beneficiary, *I*, 265.

Removal of, if to the advantage of trust, *L*, *M*, 265.

Inherent jurisdiction of Court to appoint, *N*, 265.

not to be removed when, *R—V*, 265, 266.

trustees who are not proper persons, *Y*, *Z*, *A—D'*, 266.

former, removed for misconduct—Charge incurred in appointing, *W*, 266.

Suit for removal of—Circumstances of general malice cannot be stated, *X*, 266.

Alien friend, whether can be a, *H*, 267.

Beneficiary's right to compel, to any act of duty, *S*. 61, 267—270; Principle of *S*. 61, *P—R*, 268.

Right to damages from—Jurisdiction of Court, *S*, 268.

Circumstances disabling, from suing, *Y*, 268.

Wrongful purchase by—Right of beneficiary, *S*. 62, 270—280.

Auction-sale, when, allowed to bid, *Z*, *A*, *B*, 272.

Severance of relationship of, and beneficiary—Right to purchase, *C*, *D*, 272.

de son tort—Purchase, *E*, 272.

to preserve contingent remainders, *F*, 272.

Trustee—(Continued),

- for 'separate', *G*, 272.
- to bar dower, *H*, 272.
- Suit to set aside purchase by—Costs, *Q*, *R*, 273.
- Discharge of, from sale, *T*, 274.
- Purchase in one lot by—Like remedy beneficiary in sale, *U*, *V*, 274.
- Suit to set aside wrongful purchase by—Onus of proof, *K*, *L*, 275.
- Sale by, to one with notice—Right of beneficiary, *R*, 276.
- Purchase from, with notice, *S*, 276.
- Sale by, to another notice—Beneficiary's remedy, *T*, *U*, 276.
- Purchase of shares by—Subsequent sale by him to another—Beneficiary's remedy *V*, *W*, 276.
- incurring expenses—Proper expenses what are, *I*, 278.
- Foundation of—'s right to expenses, *J*, *K*, 278.
- Misconduct of—How it affects his right to costs, *L*, 278.
- Setting aside sale—Liability of, *M*, *N*, 278.
- Liability of, or purchaser to account for profits but not with interest, *O*, 278.
- Deterioration of property wrongfully purchased—Liability of trustee, etc., *Q*, 278.
- Purchase from trustee to preserve contingent remainder—Liability of purchaser, *Q*, 281.
- Alienation by—Limitation—title of purchaser, *R*, *S*, 281.
- Misappropriation of trust moneys—Bankruptcy of, *D*, 288.
- Breach of trust by—Appropriation, *E*, 288.
- Person standing in fiduciary relation other than, *I*—*K*, 288.
- Beneficiary committing breach—Assignment—Right of *cestui que trust* to follow, *L*, *M*, 288.
- Acquisition by, of trust property wrongfully converted, *S*, 63, 292.
- Land sold by, coming into his possession subsequently, *Q*, 292.
- Defaulting—cannot claim as against beneficiary, *R*, 292.
- Mixing up of trust moneys with common fund—Breach of duty, *T*—*W*, 292.
- Trust funds employed by, in trade, *C*, 294.
- mixing trust fund with his own—Identification, necessity for, *D*, 294.
- Effect of, bound to invest a certain sum, purchasing at that amount, *E*—*G*, 294.
- Right of, concurring in breach trust funds, *J*, 294.
- Right of, to recover from beneficiary for life on behalf of beneficiary in remainder *I*, 299.
- of vacating office of Ch. VII, Ss. 70, 76, 302—323.
- office how vacated, *S*, 70, 302.
- Discharge of *S*, 71, 302—305.
- Discharge by means prescribed by instrument of trust—*S*, 71, 302.
- Reason for this provision, *Y*, 302.
- Form of power most commonly used—English precedents, *Z*, *A*—*D*, 302, 303.
- to see that circumstances urging him to retire are precisely those contemplated by proviso, *E*, 303.

Trustee—(Concluded).

Getting himself discharged on application to Court, *Z, A, 305.*

No new, can be found—'s right to discharge, *B, 305.*

Discharge of, by order of Court, *U, 305.*

Issue of originating summons for appointment of new, *V, 305.*

Payment of costs for retiring *W, X, 305.*

cannot capriciously retire, *H, 306.*

wilful misbehaviour on the part of, *G, 306.*

Appointment of new, on death, etc, *S, 73, 307—318.*

Provision of *S, 73*, source of, *T, 308.*

Death of one of the trustees, effect of, on administration of trust estate, *X, 308.*

Death of a—Appointment of, another in his place, *Y, 308.*

Retirement of, in consideration of premium, *H, I, 301.*

Refusing or retiring, power of, *N, 310.*

Discretion of Court to remove, found unfit, *O, 310.*

Power to appoint, personal right, *P, 310.*

not imperative, *Q, 310.*

Donee of power, when may act as, *R, 310.*

Joint holders of power to appoint new—power of survivor, *S, 310.*

Power of nominating two trustees in place of one, *T, 311.*

Appointment of one, in place of several is bad, *C, D, 312.*

Whether the donee of power could appoint himself, *I—K, 312.*

Retirement of one of two trustees—Appointment of co-trustee, *P—R, 315.*

Empowering continuing, to represent retired, *V, 316.*

Retirement of single—Appointment of two instead, *W—Z, 316.*

Increase and decrease in number—English and Indian Law, *G, H, 317.*

In what cases Court may increase number of trustees, *I—K, 317.*

Tendency of Courts, against reducing number of trustees, *M, 317.*

a minor—Appointment of new, by Court, *X, 319.*

Refusal of continuing, to act with the—proposed, *V, 321.*

Appointment of infant as, if valid, *X, 321.*

Appointment of female as, if valid, *Y, 321.*

A bare authority to—Death of—Effect, *K, L, 323.*

Trustee for sale, may not purchase, *G, H, 241.*

Trustee may not buy as agent, *I, 241.*

Agent of trustee may not buy, *J, 241.*

Trust estate, Part of, lost-effect, *N, 307.*

Trust for sale, General rule, *N—Q, 270, 271.*

Business—Property wrongfully purchased by trustee—Terms on which sale will be set aside, *R, 271.*

Retirement of trustee—How it affects his right to buy, *S, 271.*

Wrongful purchase by trustee—Advantage to trustee not necessary, *T, 271.*

Wrongful purchase by trustee through others, if valid, *U—X, 271.*

Trust for sale—(Concluded).

- Purchase at public auction by trustees, *Y*, 272.
- Purchase by executors and administrators, *J*, 272.
- How such purchase must be made, *K—M*, 273.
- Proceeds, undisposed of, *I*, 334.

Trust funds, Outstanding on personal security to be recovered by suit, *F*, 84.

- Even if debtor is co-trustee, *G*, 84.
- Solicitor's advice will not excuse trustee failing to recover, *J*, 85.
- nor the fact that debtor's credit may be injured, *K*, 85.
- not to be allowed to be outstanding on personal security, *K*, 88.
- Even where they are not regularly appointed, *L*, 88.
- Consists of shares of company, *Y*, *Z*, 260.

Trust money, investment of. *S. 20*, 116—122

- Scope of *S. 20*—Section imperative, *Y*, *W*, 117.
- Law before passing of Trust Act, *X—Z*, 117, 118.
- Rule in *S. 20* applied to guardian of minors, *A*, *B*, 118.
- What it includes, *C*, 118.
- Improper loans of, *X*, 290.

Trust property defined, *S. 3*, 12.

- Trustee to inform himself of state of *S. 12*, 80—84.
- if can be transferred by registered instrument, *S*, 83.
- Trustee to protect title to, *S. 13*, 84—90.
- Care required from trustee, *S. 15*, 93—101.
- Trustee may not use for his own profits, *S. 51*, 238, 239.
- Delay in bringing suit for recovery of—Costs, *Q*, *R*, 273.
- Wrongful purchase of—Liability to pay occupation rent, *P*, 278.
- Acquisition by trustee of, wrongfully converted, *S. 65*, 292.
- mixed with other property so as to be not traceable, *X—Z*, 293.
- mixed with other property which can be traced, *A*, *B*, 293.

Trustee, Vesting of, in, *S. 75*, 321—323.

- Trusts incapable of execution, or executed without exhausting, *S. 83*, 333, 336.
- Such incapacity may be due to—Vagueness, *F*, 334.
- Being void for unlawfulness, *G*, 334.
- Failing by lapse of time, *H*, 334.

U

Undue influence, Definition, *X*, 347.

- what constituter, *Y*, *Z*, *A*, *B*, 347.
- Advantage gained by exercise of *S. 89*, 347, 488.
- Security obtained by bankers of debt, *G*, 348.

University, if charitable institution, *S—X*, 8.

Unsound mind, Meaning, *O*, 59.

V

Vendee's lien, *F*, 352.

Vendor's lien, *A—D*,

when it arises, *A*, 352.

Enforcement thereof, *B*, *O*, 353.

Lien—when lost, *D*, 352.

Volunteers, and purchasers with notice, *C*, 353

W

Waste, Trustee should prevent, *S*, 18, 111—114.

Scope of *S*, 18, *W—Y*, 111.

Rule in *S*, 18, explained, *Z*, *A*, 111.

Court will not interfere, in permissive, *F*, *G*, 112.

Cestui que trust may not benefit, by, *H*, *I*, 112.

Tenants for life without impeachment of, *J*, 112.

When Court may interfere—need not actually be committed, *K*, *L*, 112.

When Court may interfere—Even a single act of, will suffice, *M*, 113.

Court will not interfere when, is trivial, *N*, 113.

Principle on which Court acts, *P*, *Q*, 113.

by Hindu widow—Suit by reversioners, *R—W*, 113.

Suit to set aside Hindu widow's alienation and to restrain her from committing waste, *X*, 113.

Principle of maintainability of, such suits, *Y*, *Z*, *A*, 114.

Will, directing deed to be executed—Date of deed, date of gift, *T*, 56.

Trust to children of attesting witness, *U*, 56.

THE INDIAN TRUSTS ACT, 1882.

TABLE OF CASES NOTED IN THIS VOLUME (VOLUME AND PAGE).

I. L. R. Allahabad Series.		I.L.R. All. Series.—(Cld).		I.L.R. Bom. Series.—(Ctd).	
Vol. & page of the Report.	Page of this Vol.	Vol. & page of the Report.	Page of this Vol.	Vol. & page of the Report.	Page of this Vol.
1 A.—		22 A.—		122	53
82	141	317	5	169	37
2 A.—		484	32, 345	10 B —	
55	50	25 A.—		88	25
460	292	195	57, 59	240	137
3 A.—				468	314
458	41	I.L.R. Bombay Series.		11 B. —	
4 A.—		1 B.—		441	37
410 (P.C.)	19	121	60	447	34
500 „	50	267	134	708	336
5 A.—		314	25	12B.—	
608	353	2 B.—		217	55
6 A.—		388	137	13 B —	
24	353	4 B.—		229	17, 27
581	26	126 (F.B.)	25, 26	14 B. —	
8 A.—		5 B.—		476	137
267	345	162	5	506	25, 27
9 A.—		173	4	16 B.—	
125	25	174	5	217	8
591	18	268	48	223	8
10 A.—		6 B.—		224	8, 9
535	348	42	34, 36, 37	226	8
12 A.—		168	25	228	8
523	347, 348	515	25	17 B.—	
13 A.—		7 B.—		566	93
432 (F.B.)	25	15	59	741	25
16 A.—		229	45	18 B. —	
478 (F.B.)	25	240	53, 54	7	56
19 A.—		242	54	444	25, 27
131	267	243	54	20 B.—	
277	288	244	58	495	56
		9 B.—		511	93, 287
		115	45		

TABLE OF CASES NOTED IN THIS VOLUME (VOL. & PAGE)

I.L.R. Bom. Series.—(Ctd.)

Vol. & page Page of this
of the Report. Vol.

21 B.—

198 30
646 138

22 B.—

213 25

24 B.—

47 23
400 350

26 B.—

47 26
159 351
301 134
449 51
472 52
598 25
543 30

27 B.—

73 26

29 B.—

170 159
188 306, 322
267 68, 73
351 63

30 B.—

591 117, 118, 122,
203, 204

31 B.—

222 80, 335
271 67, 243

33 B.—

429 176, 177

I.L.R. Calcutta Series.

2 C.—

262 40
323 137

3 C.—

407 (P.C.) 19

4 C.—

56 56
172 (P.C.) 1
455 40, 136, 137,
198

897 32, 137

I.L.R. Cal. Series.—(Ctd.)

Vol. & page Page of this
of the Report. Vol.

5 C.—

336 27
438 (P.C.) 55
700 249

910 136, 137

6 C.—

70 100 292, 295
106 35, 56

116 40
198 113
340 215

7 C.—

199 25
753 26

8 C.—

597 (F.B.) 26
766 136
788 137, 336, 338

887 326, 327

10 C.—

1073 27

11 C.—

623 250

12 C.—

505 19

15 C.—

329 73, 76, 79

16 C.—

414 23 26

17 C.—

620 42, 54, 108

18 C.—

551 137

20 C.—

51 (F.B.) 137

22 C.—

105 22
195 25

23 C.—

790 25

25 C.—

112 55, 79
405 36, 40
616 31

I.L.R. Cal. Series.—(Ctd.)

Vol. & page Page of this
of the Report. Vol.

27 C.—

7 26
358 25

28 C.—

574 171

29 C.—

960 36, 39, 40, 55,
56

30 C.—

369 136
521 36
783 55, 56

31 C.—

1084 167

32 C.—

448 = 9 C.W.N. 239. 313
719 137

33 C.—

967 336

I. L. R. Madras Series.

1 M. —

176 52
267 215

2 M.—

227 198

3 M.—

359 68

4 M.—

244 56
404 80

5 M.—

91 (F.B.) 57, 66

6 M.—

10 197
270 78, 187, 252
381 67

11 M.—

274 136
360 110
419 26

12 M.—

89 56
322 143

TABLE OF CASES NOTED IN THIS VOLUME (VOL. 6 PAGE)

I.L.R. Madras Series—(Old).

Vol. & page of the Report. Page of this Vol.

424	25
429	25
15 M.—	
268	25
16 M.—	
301	25
17 M.—	
212	232, 234
18 M.—	
43	350
443	175, 179
21 M.—	
353	350
23 M.—	
230	252
377	341
24 M.—	
219	67
296	233
26 M.—	
450	73
461	233
553	5, 6
23 M.—	
351	68
443	178
517	2
29 M.—	
72	337, 338
177	351
302	233
412	83
30 M.—	
67	350
31 M.—	
97	336, 337
187	56, 329

Punjab Record.

8 P.R.—	
127	100
167	276

Punjab Record—(Old).

Vol. & page of the Report. Page of this Vol.

P.R. 1903—	
75	41
P.R. 1889.—	
133	326
Allahabad Weekly Notes.	
1 A.W.N.—	
33	26
2 A.W.N.—	
169	145
Bombay High Court Reports.	
1 B.H.C.—	
App. IX	9, 10
XI (XIII)	10
XVII App.	10
2 B.H.C.R.—	
127	131
133 (O.C.J.)	52, 55,
	77
137 (O.C.J.)	52
388 at p. 410	334
6 B.H.C.R.—	
59 (O.C.)	253, 259
717	332
7 B.H.C.—	
149 (A.C.J.)	55
8 B.H.C.—	
169 (O.C.J.)	101
9 B.H.C.R.—	
10	314
333	75, 79, 82, 153
11 B.H.C.—	
37	25
41	25
64	27
12 B.H.C.R.—	
184	87, 103, 104,
	117, 180, 120
199	102
190	104, 125
214 (A.C.J.)	37
262	21, 32
29 Bom.—	
306,	332, 333

Bombay Law Reporter.

Vol. & page of the Report. Page of this Vol.

1 Bom. L.R.—	
667	209
721	73, 75, 93
3 Bom. L.R.—	
857	51
4 Bom. L.R.—	
199	76, 77
5 Bom. L.R.—	
144	26
274	141
334	55, 57
6 Bom. L.R.—	
263	52, 54
906	159
907	159
7 Bom. L.R.—	
45	73
179	51, 73, 80
195	306
255	63
691	150, 151, 153, 159
8 Bom. L.R.—	
328	80, 335
652	67
883	117, 118, 122, 203,
	204
9 Bom. L.R.—	
314	303
542	336
606	342, 346
10 Bom. L.R.—	
1209	53, 54, 73
11 Bom. L.R.—	
85	11
495	177
Calcutta Law Journal.	
1 C.L.J.—	
232	137
388	55
4 C.L.J.—	
22	336
198	140, 142

* In the body of the book this is wrongly printed as 10 B.L.R. 1209

TABLE OF CASES NOTED IN THIS VOLUME (VOL. & PAGE).

Calcutta Law Reports.		Bengal Law Reports.		Weekly Reporter.—(Old).	
Vol. & page of the Report.	Page of this Vol.	Vol. & page of the Report.	Page of this Vol.	Vol. & page of the Report.	Page of this Vol.
1 C.L.R.— 80	133, 134	2 B.L.R.— 11 (O.C.J.) 148 „	34 37	13 W.R.— 1 (P.C.) 76 (note)	332 6
2 C.L.R.— 310	56	3 B.L.R.— 1 (O.C.) 92 „	6 252	16 W.R.— 228	22
3 C.L.R.— 197 315	4 40, 136, 137, 138	409 (A.C.) 923	252 21	17 W.R.— 41	266
4 C.L.R.— 193	137	4 B.L.R.— 41 (O.C.J.) 103 „ 154 „ 231 „	6 34 2 34, 35, 40 56	18 W.R.— 359	40
6 C.L.R.— 58 195 588	249 136, 137 113	291 (O.C.) 5 B.L.R.— 347 (F.B.) 433 508	256 37 114	20 W.R.— 269	332
7 C.L.R.— 19 278	292, 295 40	9 B.L.R.— 377 401	4, 35, 36, 40 1, 2	21 W.R.— 430	114
Calcutta Weekly Notes.		10 B.L.R.— 19 240	266 60	22 W.R.— 8	26, 259
1 C.W.N.— 265	288	13 B.L.R.— 222 48 Sup. Vol.	114 114	24 W.R.— 86 96 (Foot-note).	113 113
2 C.W.N.— 207 750	26 25	Weekly Reporter.		W.R. (1864).— 40 (F.B.)	28
3 C.W.N.— 30	25	W.R.— 377	2	Madras High Court Reports.	
5 C.W.N.— 273	172	5 W.R.— 120	281	2 M.H.C.— 12	6
6 C.W.N.— 267 372 663 949 (P.C.)	55, 56 341 76 30	6 W.R.— 111	2	2 M.H.C.R.— 37	41
7 C.W.N.— 11 at p. 18 294 353 441 (P.C.)	25 27 136 31	7 W.R.— 273		2 M.H.C.— 39	41
8 C.W.N.— 918	73, 76, 77	8 W.R.— 273		2 M.H.C.R.— 114 270	141 140
9 C.W.N.— 239	78	9 W.R.— 338 483 584	332 6 6	2 M.H.C.— 273	141
10 C.W.N.— 566 650	68 336	Madras Law Journal.		2 M.L.J.— 316	8

TABLE OF CASES NOTED IN THIS VOLUME (VOL. & PAGE).

5

Mad. Law. Journal.—(Ctd).		Oudh Cases.		Moore's Indian Appeals.	
Vol. & page of the Report.	Page of this Vol.	Vol. & page of the Report.	Page of this Vol.	Vol. & page of the Report.	Page of this Vol.
11 H.M.L.J.—		2 O.C.—		1 M.I.A.—	
188	180	319	24	175	10, 59, 64
13 M.L.J.—		7 O.C.—		2 M.I.A.—	
206	96, 97, 249, 252	307	342	390	37
364	2, 41	12 O.C.—		4 M.I.A.—	
14 M.L.J.—		236	228	452	88
105	40	224 (S.C.)	252	6 M.I.A.—	
15 M.L.J.—		Punjab Law Reporter.		53	1, 5, 533
466	2	P.L.R. 1903.—		433	6, 114
478	337, 338	125	41	445	6
18 M.L.J.—		Lower Burma Rulings.		8 M.I.A.—	
152	336, 337	L.B.R.—		66	37, 55
154	42, 55, 56, 78	9	42	13 M.I.A.—	
	245, 335			232	333
Madras Law Times.		Law Reports Indian Appeals.		14 M.I.A.—	
1 M.L.T.—		2 I.A.—		289	37, 266
227	83	18 (P.C.)	345	433 (P.C.)	328
3 M.L.T.—		5 I.A.—		452	136
246	336, 337	178	4	Sind Law Reports.	
5 M.L.T.—		L.R. 6 I.A.—		1 S.L.R.—	
301	11	161	69	218	176
6 M.L.T.—		9 I.A.—		Travancore Law Reports.	
143	75, 77, 217	70	50	13 T.L.R.—	
Central Provinces Law Reports.		15 I.A.—		360	151
13 C.P.L.R.—		1 (P.C.)	73, 76, 79	Indian Cases.	
43	25	81	345	2 I.C.—	
Nagpur Law Reports.		24 I.A.—		4	329
4 N.L.R.—		10	288	Indian Jurist.	
26	337	Supl. Vol. I.A.—		2 Ind. Jur. (N.S.)—	
		47 (P.C.)	35, 36, 40	224	68

NAMES OF CASES NOTED IN THIS ACT.

English Cases.

A

	PAGE
Aamilton v. Wright, 9 C and F 111 ...	341
Aberdeen v. Aberdeen, 2 App Cas 544 ..	273
—— Ry Co v. Blake, 7 Macq 461 ..	343
—— v. —, 1 Macq H L Cases 461 ...	240
—— Town Council v. Aberdeen University, L R 2 Ap Cas 541 ...	55
Acherley v. Roe, 5 Ves 565 ...	285
Ackroyd v. Smithson, 1 W T 372 ...	336
Acton v. Woodgate, 2 M and K 492 ...	211, 325, 326
Adair v. Shaw, 1 Sch and Lef 272 ...	130
Adams Re, 12 Ch D 634 ...	301
Adams v. Clifton, 1 Russ 297 ...	113, 229
—— v. Paynter, 1 Coll 532 ...	315
—— v. Scott, 7 W R 213 ...	121
—— v. Taunton, 5 Mad 435 ...	209
—— and Kensington Vestuj, Re, 27 C D 394 (407)	50
Adhowar D' v. Bertland, 35 Beav 19 ...	317
Adye v. Fenilletean, 1 Cox 24 (25) ...	118
Agra Bank, Re, 3 L C Ch App 555 ...	261
—— v. Barry, L R 7 H L 135 ...	23
Akerman, 3 Ch 43 ...	299
—— v. Akerman, (1891), 3 Ch 212 ...	173
Alcock v. Sloper, 2 M and K 697 (699)...	106, 107
Aldridge v. Westbrooke, 4 Beav 212 ...	306
Alexander, Re, 13 Ir Ch Rep 137 ...	218
—— v. Duke of Wellington, R and M 35	15
Allen v. Jackson, L R 1 Ch D 399, 103	35, 36
—— v. v. Mc Keen, 1 Summ 314 (Am)	110
—— v. Seckhan, 11 Ch D 795 ...	29
Allwood v. Haywood, 1 H and C 715 ...	255
Aloon'M v. M'Aloon, (1900) 1 L R 367	170
Alsop v. Bell, 24 Beav 451 ...	172
Alton v. Harrison, Lewin 11th Ed p 771	166
Amand v. Bradburne, 2 Ch Ca 138 ...	166
Amber, Re, 59 L J 210 ...	312
Ames v. Parkinson, 7 Beav 384 ...	86
AmAies v. Skillern, 9 Jur 122 ...	750
Anderson, <i>Er parte</i> , 5 Ves 243 ...	309
Andrews v. Mc Guffog, 11 A C 313 ...	283
—— v. Weall, 12 Ch D 648 ...	231
Angell v. Dawson, 3 Y and C 317 ...	182
Angerstein v. Martin, T and R 230 ...	121
Angier v. Stannard, 3 M and K 556 ...	298
Anon Case, 6 Madd 10 ...	269
Anson v. Potter, 13 Ch D 141 ...	181

	PAGE
Apsey, <i>Ex parte</i> , 3 Bro C C 265	296
Ardill v. Savage, 1 Ir Eq Rep 79	306
Armes v. Parkinson, 7 Beav 379	121
Armitage v. Coates, 35 Beav 1	37
Armstrong v. Reeves, 25 L R Ir 325	64
Arnold v. Chapman, 1 Ves Sen 108	330, 334, 337
Ashburnhan v. Thompson, 13 Ves 402... ..	145
Ashby v. Palmer, 1 Mer 296	148
Ashwell v. Loni, L R 2 P and D 477	347
Asker v. Thomson, 4 K and J 620	80
Astbury v. Beasley, 17 W R 638	99
Astley v. Earl of Essex, 6 L R Ch App 898	147
Atkinson v. Atkinson, 62 L T 735	51
— v. Donby, 6 H and N 778	351
Atkyns v. Wright, 17 Ves 255	45
Att-Gil. v. Alford, 4 D M and G 851	133, 146
— v. Aspinall, 2 My and Cr 623	14
— v. —, 2 M and Cr 613	58
— v. —, 1 Keen 513	9
— v. Brewer's Co., 1 Mer 495	285
— v. Brickdall, 8 Beav 223	232
— v. Brodie, 6 Moo (P.C.) 12	10
— v. Clack, 1 Beav 473	313
— v. —, 1 Beav 467	225
— v. Cleg, 1 Atk 356	323
— v. Cooper's Company, 19 Ves 187	266, 334
— v. Corporation of South Molton, 14 Beav 357	331
— v. Donening, Amb 582	51
— v. Fletcher, 5 L J Ch 75	221
— v. Forster, 13 Ves 344	9
— v. Geary, 3 Mei 513	190
— v. Gleg, 1 Atk 356	15, 223
— v. Governor of Harrow, 2 Ves 551 (552)	190, 234
— v. Herrick, Amb 712	331
— v. Highan, 2 Y and C C C 634... ..	120
— v. Lady Downing, Wil 21, 22	51
— v. Lord Dudley, G Coop 145	273
— v. Lord Gove, 1 Mod 150	245
— v. Mayor of Bristol, 2 J and W 294 (307)	331
— v. Mayor of Exeter, Jac 448	284
— v. Moore, 20 Beav 110 (119)	73, 283
— v. Munro, 2 De G and Sm 163... ..	91
— v. Owen, 10 Ves 555 (560)	189
— v. Pearson, 3 Mer 353 (412)	33, 315
— v. —, 7 Sim 290, 309	266
— v. Scott, 1 Ves 413	15, 184, 231
— v. Solly, 2 Sim 518	145
— v. Stephens, 3 M and K 347	262
— v. Wilson, Cr and Ph 1	58
— v. —, 3 M and K 362	334
Austin v. Austin, 4 Ch D 233	183

	PAGE
Aveline v. Methuish, 2 De G J and S 288	134
Avery v. Griffin, 6 Eq 606	321
Ayerst v. Jenkins, 16 Eq 275	338
Ayliffe v. Murray, 2 Alk, 58	84, 235

B

Back v. Gooch, 4 Camp 232	80
Backhouse v. Backhouse, Lew 678	51
— v. —, V C of Eng 20 Dec 1844	262
Backland v. Pockwell, 13 Sim 412	352
Bacon v. Camphansen, 58 L T 851	155
Bahn v. Hughes, 31 Ch D 390	152, 156
Bailey v. Gould, 4 Y and C Ex 221 (226)	88, 89, 101
Bailhe v. M'Kewan, 35 Beav 183	68
Bainbrigge v. Blair, 1 Beav 495	266, 277
Baker v. Martin, 8 Sim 25	235
— v. Read, 18 Bea 398	273, 274, 275
Ball v. Harris, 4 M and Cr 264	199
Balls v. Strutt, 1 Hare 146	269
Balsh v. Hyham, 2 P W 453 (455)	167, 171
Bamford v. Baron, 2 P R 594 note (a)	80
Banbury v. Briscoe, 2 Ch Ca 42	349
Barker, 1 Ch D. 43	309
Banks v. Goodfellow, L R 5 Q B 549	58
Barber, <i>Ex parte</i> , 28 W R 522	282
— L R 34 Ch D. 77	236
Barclay v. Andrew, 1899, 1 Ch 686	277
Barclay, <i>Re</i> , Barclay v. Andrew, (1891) 1 Ch 674	144, 146
— v. Pearson, (1893) 2 Ch 163	286
Bardswell v. Bardswell, 9 Sim 319	47, 49
Barker v. Peile, 2 Dr and Sm 340	226, 306
— v. Furlong (1891) 2 Ch 172	85
Barlow v. Grant, Vern 255	193
Barnard v. Bagshaw, 3 D J and S. 355	151
— v. Hunter, 2 Jur N S 1213	259
Barnes v. Addy, L R 9 Ch 244 (251)	134, 135
— v. Grant, 26 L J Ch 92	51
Barney, <i>Re</i> (1892), 2 Ch 265	168
Barnhast v. Greenshields, 9 Moo. P.C 18	19
Baro v. Willes, (1899) 2 Ch 578	345
Barros v. Addy, 9 L R Ch App 244	312
Barret, <i>Ex parte</i> 10 Ves 400	273
— v. Hartley, 12 Jur N S 426	236
— v. Hartv, 2 L R Eq 789	235
Barrington's Settlement, <i>Re</i> 1 J and H 142, 143	175, 178
Barrow v. Wadkin, 24 Beav 1	64
— v. Willis, (1900) 2 Ch 121	243
Barrow's case, <i>Re</i> L R 14 Ch D 432	291
Barry v. Barry, 1 J and W 653	113
Bartan v. Irwin, W N (1895) 23	179
Bartlett v. Bartlett, 4 Ha. 631	269

	PAGE
Barwell v. Barwell, 34 Beav 371	275
Bate v. Hooper, 5 D M G 338	102
Dateman v. Davis, 3 Madd 98	75, 120
Baugh v. Price, 1 G Wills 320	277, 278
Beaufy, <i>Re</i> 1 Sm and G ff 20	105
Beaumont v. Oliveria, L R 4 Ch 309	8
Beavan v. Beavan, 24 C D 649	108
Beckett v. Cordley, 11 Es J 55	28
—— v. ———, 1 B C C 358	138
Beddoe <i>Re</i> , (1893), 1 Ch 547 (557, 558)	83, 166, 250, 255
Beddowes v. Pugh, 26 Beav 407	75 91,
Bedry v. Gibbons, 8 Ch App 747	224
Becherens, <i>Re</i> , W N (1888) p 95	179
Belolay v. Carter, 17 W R (Eng) 190	19
Belchier, <i>Ex parte</i> , Amb 218 (219, 220)	195, 229, 230
Benee v. Gilpin, L R 3 Ex 79	69
Benningfield v. Baxter, 12 App Cas 167	268, 273
Bonn v. Dixon, 10 Sun 636	102, 106
Bennett <i>Ex parte</i> , 10 Ves 381 (400, 401)	241, 274 277 278
—— v. Burgis, 5 Hare 295	307, 314
—— v. Colley, 2 M and K 225 (232)	138, 282
—— v. Wyndham, 4 D F and J 259	165
Benny v. Redgard, 1 Cox 147	209
Bernard v. Bagshaw, 3 D J and S 355	233
—— v. Minshull, Johns 276	46
Berrett v. Hartley, L R 2 Eq 787	237
Berry v. Gibbons, 8 Ch App 747	225
Besley v. Besley, 37 Ch D 618	268
Bestock v. Floyer, 1 L R Eq 28	95
Bethall v. Abraham, 17 E Q 24	65, 185, 187, 225, 226
Bethune v. Kennedy, 1 M and Cr 114	105
Bevel Telephone Co., <i>In re</i> , 43 L J Ch 720	307
Beyton v. Bury, 2 P Wms 626	323
Biggs v. Peacock, 22 Ch D (C A) 284	124, 197, 248
Bignold's Settlement Trusts, <i>Re</i> , 7 L R Ch App 223	309, 310, 319
Billing v. Brogden, 38 C D 546	85
Bingham v. Clanmorries, 2 Moll 253	71, 219
Binks v. Lord Rokeby, 2 Madd 227, 238	208
Birch v. Balgrave, Amb 264	337
—— v. Wade, 3 V and B 198	46
Birchell v. Ashton, 40 C D 436	220
—— <i>Re</i> Wilson v. Birchell, 16 C D 41	217
Birch Wolfe v. Birch, L R 9 Eq 683	112
Bird <i>Re</i> , L R 16 Eq 203	230
—— v. Philpot, 1 Ch 822	59
Birkett, <i>Re</i> 9 Ch D 576	33
Birks v. Micklethwait, 33 Beav 409	155, 157, 299
—— v. ———, 34 L J Ch 364	165
Birls v. Betty, 6 Madd 90	155
Bishop of Cloyne v. Young, 2 Ves Sen 91	329
Biss <i>Re</i> , (1903) 2 Ch 40	349

	PAGE
Blackburn, Law and Co. v. Vigors, 12 App Cas 531	31
Blacklow v Laws, 2 Hare 40	75, 248
Blackwood v. Borrowes, 2 Conn and Laws 459	142
Blagrove v. Routh, F and J 509	180
Blair v Bromley, 2 Ph 354	282
— v. —, 5 Ha 542	147
Blake, Re, Jones v Blake, 29 Ch D 913	188
— v. Bunbury, 1 Ves 194	217
— v. Gale, 31 Ch D 196	284
Blann v. Bell, 2 D M and G 779	104
Blezard v. Whalley, 2 Eq 1093	190
Blinkhorne v. Peist, 2 Ves Sen 30	67
Blove, Re, 1 Men and G 488	124
Blue v. Marshall, 3 P Wins 381	98, 218
Blundell, Re, L R 44 Ch D 1	170
Blvth v Birmingham Water Works Co 11 Ex p 784	24
— v. Flaagate, 1 Ch 337	155
Boardman v Mossman, 1 B C C 68	153
Bolesand British Land Co, Re, (1902) 1 Ch 244	271
Bolton v. Curre, (1895), 1 Ch 544	174, 299, 301
Bond, Re Cole v. Hawes, 4 C D 238	49
Bonithon v Hockmore, 1 Vern 316	237
Booth v Booth, 1 Bea 125	70
— v. —, 1 Bea 580	173
— v. Turle 16 Ex 182	340
Booy v. Smith, 2 Ch Ca 124	291, 292
Boss v. Goddall, 1 Y and C C C 617	75, 119
Bostok v Floyer, 1 Eq 29	230
Boswell v. Coaks, 27 Ch D (C A) 424	275
Boughton v. Knight, L R 3 P and M 68	58
Boursot v. Savage, 2 L R Eq 134	261, 280
Bowden v. Bowden, 17 Sim 65	106
Bowen v. Phillips, (1897) 1 Ch 174	269
Bowles v. Stewart, 1 Sch and Lef 209 (226)	144, 353
Bowmen, Re, (1893) 2 Ch 491	34
Box Re, 1 Henn and M 552...	178
Boyce v Edbrooke, 1 Ch 836	190
Boyd v. Boyd, 4 Eq 305	193
Boyer v. Maclean, (1903) 1 Ch 848	216
Boylan v Fay, 8 L R Tr 374	170
Boyon v. Williams, 3 Y and J 150	22
Boys v. Boys, 28 Bea 436	105
Brace v. Taylor, 2 Atk 253	113
Brackunbury Re, 10 Eq 45	317
Bradbrook Re, Lock v. Wilks, 56 L P 106	101
Bradley v. Witchurch, W N (1868) 81	183
Bray v. West, 9 Sim 429	71
Brazier v. Camp, 63 L J Q B 237 (257)	211, 249
Breary Re, W N (1873) 1248	311
Breed's Will Re, 1 Ch D 226	205
Bremwell v. Lacy, 10 Ch D 691	9

	PAGE
Breton's estate, <i>In re</i> , 17 Ch D 416	53
Briar, <i>In re</i> , 26 Ch D 238	159
Brice v. Stokes, 11 Ves 319... ..	104, 153, 154, 279, 300
— v. — 2 Wh and Tn 633	94
Bridge v. Brown, 2 Y and C C 181	190
Brier <i>Re</i> , L R 26 Ch D 238	230
— v. Brier, 26 Ch D 243	186
— v. Emson, 26 Ch D 238	230
Brierley, <i>Re</i> B. V. B. 43 W R 36	46
Briggs v Penny, 42 E R 371	329
Bright v Legerton, 29 Beav 60	300
— v. North, 2 Ph 200 (220)	86, 190
Broadbent v. Barlow, 30 L J Ch 569	21
Broadhurst v. Balgny, 1 Y and C C C 16	139
Brooksopp v. Barnes, 5 Madd 90	237
Brogden, <i>Re</i> , Billing v Brogden, 38 Ch D 546	97, 98
Brook v. Brook, 1 Beav 531... ..	321
Brooke, <i>Re</i> , (1894) 2 Ch 600	185
— v Lord Mortyn, 2 D G and S 373	216
Brown, <i>Re</i> , 27 Beav 324	253
— v. Burdett, 21 Ch D 667	39, 65
— v. Gellatly, 2 Ch 751	107
— v. Groombridge, 4 Mad 495	172
— v. Higgs, 8 Ves 574	262
— v How, Barn 354	249
— v. Litton, 1 P Wms 140	84
— v Smith, 10 Ch D 377	205
Browne v Savage, 4 Drow 635	260
Brown's Trusts, L R 5 Eq 88	261
Brunskill v. Card, L R 16 Eq 493	176
Bubb v. Padwick, 13 Ch D 517	251
Buchanan v Hamilton, 5 Ves 722	265, 309
Buckeridge v. Glasse, 1 Cr and Ph 126 (131, 135)	69, 139, 280
Buckhurst's case, 1 Co Rep 100	256
Buckhurst's Peerage, The L R 2 App Ca 1	62
Buggins v Yates, 9 Mod 122	47, 49
Bulkeley v. Eglinton, 1 Jur N S 994	71, 222
Bull v. Vardy, 1 Ves Jan 270	47
Bullock v. Wheatley, 1 Coll 190	88
Burden v. Burden, 1 V and B 170	235
Burdick v. Garrick, 5 Ch App 233	146
Burges v. Lamb, 16 Ves 174	109
Burgess v. Wheate, 1 Eden 176 (195, 226, 255)	66, 92, 238, 281
Burkby's settled Estates, <i>Re</i> , 42 Ch D 621	255
Burke, 45 L J Ch 52	304
— v. Jones, 2 V and B 275	214
Burn v. Carvalho, 4 M and Cr 702	259
Burnhast v. Greenhields, 1 P C 18	26
Burrough v. Phileox, 5 M and Cr, 92	263
Bushell v. Bushell, 28 Ch & L 90	25
Butler v. Bray, Dyer 189 b... ..	223

NAMES OF CASES.

7

	PAGE
Butler v. Carter, 5 L R Eq 281 ...	300
—— v. Crimpton, 7 L R Eq 16 ...	171
—— and Bakers' case, 3 Rep 26 b 27 a ...	222
Butt's Estate, <i>Re</i> , 1 Drew 319 ...	231
Buxton v. V. Buxton, 1 M and Cr 80 (93) ...	87, 97, 125, 132, 201, 202
Byrne v. Frere, 2 Moll 171, 178 ...	283
—— v. Norcott 13 Bea 336 ...	87, 88

C

Cadwick v. Heatley, 2 Coll 137 ...	182
Cafe v Bent, 5 Ha 24 (36)... ..	103, 105, 223, 225
Caffory v. Darby, 6 Ves 188 (495, 496, 497) ..	85, 86, 88, 131, 164
Caldecott v. Brown, 2 Hare 144 ...	175
Calisher v. Forbes, 7 L R Ch App 109 ...	260
Caun v. Caun, 1 P W 727 ...	279
Cambers v. Howell, 11 Beav 6 ...	242
Camden v. Murray, 16 Ch D 170 ..	65
Cameron v. Cameron, 1893 3 Ch 468 ...	238
Campbell, <i>Re</i> , 31 Beav 176 ...	321
——, v. Allgood, 17 Beav 623 ...	112
——, v. Hooper, 3 Sm and G 153 ...	58
——, v. Walker, 5 Ves 678 ...	210, 241, 212, 271, 279
Can v Caun, 51 L T 770 ...	230
Candler v. Tillet, 22 Bea 257 ...	89
Cann v. Caun, 33 W R 40 ...	98
Cappard v. Allen, 2 D (G J and S 173 ...	133
Charles v. Jones, 35 Ch D 344 ...	342
Carrick v. Errington, 2 Wms 361 ...	334, 337
Carson v. Sloane, 13 L R Ir 139 ...	294
Carter v. Sobright, 26 Beav 376 ...	313
Cartwright, <i>Re</i> , Avis v. Newman, 41 Ch D 532 .	191
Cary v. Cary, 2 Ch & Lef 189 ...	48
Caster v. Horne, 1 Eq Ca Ab 7 ...	239
Cater's Trusts, <i>Re</i> , 25 Beav 366 .	181
Cavandar v. Butteel, 9 Ch 79 (85) ..	26, 27
Cavandish v. Greaves, 24 Beav 163 (173) ...	301
Cave v. Cave, 15 Ch D 639 (644) ...	31, 32, 286
—— v Roberts, 8 Sm 214 ...	92
Cavendish v. Geaves, 24 Beav 163 ...	258
Chadwick v. Healty, 2 Coll 137 ...	181
Chalmer v. Bradley, 1 J and W 51 (67, 68) ...	138, 227, 272, 275
Chambers, <i>Ex parte</i> , 1 R and M 577 ...	193
—— v. Goldwin, 9 Ves 254 ...	84
—— v. Howell, 1 Beav 6 ...	244
—— v. Menchin, 7 Ves 196 ...	229
Champion, <i>Re</i> , (1893) 1 Ch 101 ...	286
—— v. Rigby, 1 R and M 539 ...	273
Chandler, <i>Re</i> , 22 Beav 253 ...	77, 135
—— v. Bradley, 1897 1 Ch 315 ...	238
—— v. Tillet, 22 Beav 257 ...	162, 163
Chapman, <i>Re</i> , (1896), 2 Ch 763 (C A) ...	83
—— v. Brown, 6 Ves 404 ...	33, 337

	PAGE
Charitable Corporation v. Sutton, 2 Atk 406	74, 247
Charles v. Jones, 33 C D 80	278
Charlton v. Earl of Durham, L R 4 Ch App 433	207, 209
Chellingworth v. Chambers. (1896). 1 Ch 685	173
Cherdwynd's Settlement, Re, (1902) 1 Ch 692	305
Chertsey Market, Re, 6 Price 261 (279, 285)	124, 153, 192
Chester v. Rolf, 4 De G M and J 798	192
Chesterfield, Re, 24 C D 643	108
Child v. Stephens, 1 Vern 101	218
Chillingworth v. Chambers, 1 Ch 685	155, 156, 243, 298
Christ's Hospital v. Grainger, 1 Mac and G 460	9, 14
Churcher v. Martin, 42 Ch D 312	93
Civil v. Rich, 1 Ch Cas 309	111
Clack v. Holland, 19 Bea 262	88, 291, 301
— v. —, 29 Bea 273	131
Clare v. Earl of Bedford, 13 Vin 536	67
Clark v. Clark, L R 9 App Ca 733	242
— v. Hoskins, 37 L J Ch 561	96
— v. Ormonde, Jac 120	115, 197, 198
Clay v. Jetley, 16 Ch D 3	217
— v. Rufford, 5 De G and Sm 768	100
Clements v. Hall, (1894) 1 Ch 343	344
Clifton v. Goodbun, 6 L R Eq 278	33
Clinton, Re, 8 W R 492	213
Clough v. Bond, 3 My and Cr 490 (496)	87, 88, 211
— v. Dixon, 8 Sm 594	99
Coates to Parsons, Re, 34 Ch D 370	309
Cock v. Goodfellow, 10 Mad 489	119
Cockburn v. Adwards, 18 Ch D 455	343
Corell v. Taylor, 15 Bea 103	291, 301
Cocker v. Qualyle, 1 R and M 535	139, 204
Cockerell v. Cholmeley, 1 R and M 425	143
Coe's Trusts, <i>in re</i> , 4 K and G 199	111
Coffin v. Coffin, 6 Madd 17	113
— v. —, Jac 71	112
Coggs v. Bernard, 1 Sm L C 200	86
Cogswell v. Cogswell, 2 Ed Ch 231	191
Coldecott v. Brown, 2 Hare 144, 145, 146	175
Cole v. Wade, 16 Ves 47	184
Coles v. Courter, 34 Ch D 136	188
— v. Trecothick, 9 Ves 234 (244)	242, 244, 271, 272
Coleman v. Bucks and Oxon Union Bank), (1827) 2 Ch 243	282
Collett v. Morrison, 9 Hare 162	38
Collingham v. Sloper, (1891) 2 Ch 716	217
Collins, Re, L R 32 Ch D 229	193
— v. Collins, 2 M and K 703	106
— v. Stunson, 11 Q B D 142	287
Collison v. Lister, 20 Bea 368	172
Collyer v. Isaac, 19 Ch D 342	62
Cohnan, Re v. Henry v. Strong, 39 Ch D 443	251
Colson v. Williams, 61 L T 71	124

	PAGE
Coltarn v. Easter Counties Rail Co., 1 G and H 243 ...	162, 163
Colyer v. Finch, H L C 905 ...	21
Combes v. Combes, L R 1 P and M 288 ...	215
Commissioners of Income Tax v. Pamsel, 7 Times Law Rep 657 ...	8
— v. —, (1891) A C 531 ...	8
Conolly v. Conolly, 1 Tr Rep Eq 383 ...	17
— v. Parsons, 3 Ves 628 (N) ...	201
Conry v. Caulfield, 2 Ball and B 272 ...	91
Consterdine v. Consterdine, 31 Beav 333 (331) ...	97, 211, 213, 233
Conway v. Fenton, 40 Ch D 512 ...	178, 179
Conyngham v. Conyngham, 1 Yes Sen 522 ...	71
Cook, <i>Ex-parte</i> , 8 Ves 353 ...	38
—, 4 C D 123 ...	288
— v. Addison, 7 L R Eq 466 (470) ...	100, 282, 292
— v. Collingridge, Jac 607 ...	216
— v. Crawford, 13 Sm 96 ...	223
— v. Eshelby, 12 A C 271 ...	22
— v. Hutchinson, 1 Keen 42 (50) ...	331
— v. The Stationer's Company, 3 M and K 262 (264) ...	329
Cooper v. Todd, 29 W R 502 ...	319
— and Allen, <i>Re</i> , 1 Ch D 817 ...	100
Dean, <i>Re</i> , Cooper-Dean v. Stevens, 41 Ch D 557 ...	64
Cookson v. Lee, 23 L J Ch 473 ...	276
— v. Reay 5 Beav 22 ...	148
Copper v. Allen, 4 Ch D 802 ...	251
Coppring v. Cooke, 1 Vern 270 ...	342, 349
Cornbury v. Middleton, 1 Ch Ca 211 ...	261
Cornthwaite v. Frith, 4 De G and Sm 552 ...	214
Corporation of Gloucester v. Wood, 3 Hare 131 ...	48
Corporation of Ludlow v. Greenhouse, 1 Bligh N S 17 (57) ...	268, 269
Corpus Dimes v. Scott, 4 Russ 195 ...	107
Coruthwaite v. Frith, 4 De G and Sm 552 ...	325
Cory v. Gerteken, 2 Mad 40 ...	67, 138
Cosser v. Radford, 1 De G J and S 585 ...	218
Cossinath Bysack v. Hurro-Soondery Dossee, 2 M Dig 198 ...	6
Costabadie v. Costabadie, 6 Hare 414 ...	77, 110
Costa Reca Ry Co v. Forwood, (1901) 1 Ch 746 ...	238
Costello v. D'Rorke, 3 Ir Eq R 172 ...	110
Cotterell v. Straton, 8 Ch 302 ...	278
Cottingham v. Fletcher, 2 Atk 150 (155) ...	39, 330, 336, 353
Cotton, <i>Re</i> , 1 Ch D 232 ...	205
— v. Eastern Counties Rail Co, 1 J and H 213 (247) ...	87, 256
Cotton's Trustees, <i>Re</i> , 19 Ch D 624 ...	248
Coulson, <i>Re</i> , 17 L T 27 ...	213, 232
Courtenay v. Courtenay, 3 J and Lat 533 ...	306, 307
Courthope v. Heyman, Cart 25 ...	257
Courtney v. Rawlry, 6 Ir R Eq 92 (99) ...	164, 165
Courts v. Roberts, 6 C and F 65 ...	147
Cowin, <i>Re</i> , 31 Ch D 179 ...	161, 253
Cox v. Bennett, 39 W R 308 ...	237
— v. Parker, 22 Beav 168... ...	92

	PAGE
Craven v. Craddock, 20 L T N S 638 ...	74, 247
— v. —, W N 1868 p 229 ...	79
Crawley v. Crawley, 7 Sim 427 ...	102
Crawshaw v. Collins, J and W 267, 279 ...	297
Cresswell v. Dewell, 4 Giff 465 ...	142
Crewe v. Dicken, 4 Ves 97 (100) ...	70, 184, 209, 223, 231
Crofts v. Fengs. 4 Ir Ch Rep 319 ...	325
Crombach v. Isaac. 1897 1 Ch 251 ...	212
Crook v. Hill, 6 L R Ch App 311 ...	33
Cross, <i>In re</i> , 20 Ch D 109 ...	251, 275
Crosskill v. Bower, 32 Beav 86 ...	245
Crossley v. Crowther, 9 Hare 384 (386) ...	268
Crowe v. Ballard, 2 Cox 253 ...	241, 273
— v. —, 3 Bro C C 117 ...	279
— v. Crisford, 17 Bea 507 ...	107
Crowther, <i>In re</i> , 2 Ch 56 ...	132
Crupton v. Crupton, 2 Ch 853 ...	173
Cuff v. Hall, 1 Jur N S 972 ...	126
Culpepper v. Aston, 2 Ch Ca 116 ...	127
Cummins v. Cummins, 3 Jones and L 64 ...	101
Curteis v. Wormald, L R 10 Ch D 172 ...	329
Curtis v. Rippon, 5 Mad 434 ...	47
Cutler v. Carter, 5 L R Eq 281 ...	139

D

Dance v. Goldingham, 8 Ch 902 ...	200, 269
Daniel v. Adams, Amb 495 ...	195
— v. Davidson, 16 Ves 249 ...	23, 280
— v. Warren, 2 Y and C C C 200 ...	106
Darby v. Harbin, 28 Beav 325 ...	167
Darke v. Martyn, 1 Beav 525 ...	99
— v. Williamson, 25 Beav 622 ...	169, 183
Dauson v. Small, L R 18 Eq 114 ...	330
Davall v. The New River Co, 3 De G and Sim 394 ...	92
Davenport v. Coltman, 12 Sim 610 ...	334
Daveron, <i>Re</i> , 3 Ch 421 ...	39
Davey v. Durrant, 1 D and J 535 ...	124
— v. Ward, 7 Ch D 754 ...	205
Davidson, <i>In re</i> , L R Ch D 341 (348) ...	107
Davis, <i>Re</i> , D. V. D. (1902) 2 Ch 315 ...	147
— v. Duke of Marlborough, 1 S W 74 ...	61
— v. Dysart, 20 Beav 405 ...	255, 349
— v. Hodgson, 25 Beav 187 ...	133
— v. Jaggard, 2 Ch 164 ...	299
— v. Otty, 35 Beav 208 ...	330, 337
— v. Ridge, 3 Esp 101 ...	218
— v. Spurling, 1 R and M 54 (64) ...	229, 339, 343
— v. Westcomb, 2 Sim 425 ...	109
Davy v. Durrant, 1 De G and J 535 ...	195
Dawson, <i>Re</i> , 48 W R 73 ...	320
— L.R. 39 Ch Div 155 ...	39

	PAGE
Dawson v. Clarke, 18 Ves 247 (254) ...	151, 164
— v. Hearn, 1 R L M 606 ...	248
— v. Small, L R 18 Eq 114 ...	337
Deam, Cooper-Dean, <i>Re</i> , v. Stephens, 41 Ch D 552 ...	35
Dearle v. Hall, 3 Russ 1 ...	260
De Burgh v. M'Clintock, 11 L R Jr 220 ...	250
De Bussche v. Alt, 8 Ch D 286 (314) ...	140, 143, 344
De Cordova v. De Cordova, 4 A C 692 ...	216
Deeth v. Hale, 2 Moll 317 ...	247, 248
Dennis, 5 J (N S) 1888 ...	176
Dent v. Benet, 4 My and C 269 ...	345
Denton v. Denton, 7 Beav 388 ...	161
— v. —, 7 Beav 788 ...	111
Detmold, <i>Re</i> , 40 Ch D 585 ...	38
Devaynes v. Robinson, 24 Beav 86 ...	124, 136, 289
Dibbs v. Goren, 11 Beav 483 ...	172
Dick v. Fraser, 1897 2 Ch 181 ...	211
Dickonson v. Player, C P Cooper's Cases, 1837-8, 178 ...	119
Dickonson v. Tabbot, L R 6 Ch App 32 ...	241
Dickson's Estate, <i>Re</i> , 3 I R Eq 845 ..	68
Diggles, <i>Re</i> , 39 C D 253 ...	46
Dilkes v. Broadmead, 2 D F and J 566 ...	130
Dimes v. Scott, 4 Russ 195... ..	148, 149
Dipple v. Corles, 11 Hare 183 ...	53, 54
Dixon, <i>Re</i> , 21 W R 220 ...	321
Dixon v. Gayfere, 17 Beav 421 ...	248
Docker v. Sonees, 2 M and K 655 (664) ...	239, 294
Dodds v. Hills, 2 Hem and Mil 424 ...	290
— v. Tuke, 25 Ch D 617 ...	169
Dodkin v. Brunt, 6 L R Eq 580 ...	265, 319
Doe v Alice Harris, 6 A and E 209 ...	825
— v. Godwin, 1 D and R 259 ...	223
— v. Harris, 16 M and W 517 ...	69, 71, 221
Dolan v. Macdermot, 5 L R Eq 60 ...	14
Domnes v. Cottane, 1893, 1 Ch 547 ..	166
Donaldson v. Donaldson, Kay 711 ...	57, 260
Dookin v. Brunt L R 6 Eq 580 ...	322
Doorman v. Jenkins, 2 A and E 256 ...	87
Dormor v. Fortescue, S C 3 Atk 130 ...	285
Douglas v. Allen, 1 Conn and Laws 367 ...	214
— v. Archbutt, 2 De G and J 148 ...	84
— v. Balam, 2 Ch 749 ...	263
Douglas, <i>Re</i> , Obert v. Barlow, 35 Ch D 472 ...	39
Dove v. Everard, 1 C and M 231 ...	222
Dowing v. Dowing, L R 42 Ch D 203 ...	173
Downes v. Grazebrook, 3 Mer 208 (209) ...	123, 196, 242
Dowse v. Gorton, (1891) A C 190 ...	170, 185
Doyle v. Blake, 2 Sch and L 231 (239, 245) ...	68, 69, 227
Doyley v. Att-Gl, 2 Eq Ca Ab 195 ...	263
Drake v. Whitmore, 2 De G and Sm 619 ...	199
Dring v. Greetham, 1 Eq 442 ...	185

	PAGE
Drosier v. Brereton, 15 Beav 221	130
Duke of Bedford v. Cokifenden, 2 Ves 8 116	338
——— Cleveland, <i>Re</i> , Hay v. Wolmer, 1895 2 Ch 542	108
——— Leeds v. Earl of Amherst, 2 Phillips	140
——— Norfolk's case, 3 Ch Ca 20, 28, 35, 48	34
——— Rutland's Settled Estates, <i>Re</i> , (1900) 2 Ch 206	189
Dumas, <i>Ex parte</i> , 1 Atk 232	293
Dunbar v. Tredenwick, 2 B and B 304	276
Dunch v. Kent, 1 Vern 260	214
Duncombe, (1893) A C 369	260
——— v. Mayer, 8 Ves 320	161
——— v. Nelson, 9 Beav 211	192
Dunman, <i>Ex parte</i> , 2 Rose 66	194
Dunn v. Flood, 28 Ch D 586 (628)	124, 200
Dunsdale v. Dunsdale, 3 Dr 556, 577	274
Durbar v. Tredenwick, 2 B and B 319	280
Durell v. Bellinger, (1898) 2 Ch 534	190
Durour v. Notteux, 1 Ves Sen 321	330
Dutton v. Thompson, 23 Ch D 278	167
Dyer v. Dyer, 1 W and J 20	333

E

Eade v. Eade, 5 Madd 119	49
Eager v. Barnes, 31 Beav 579	147
Earl, <i>Re</i> , 39 W R 106	87
——, Cranville v. M'Neile, 7 Hare 156	223
—— of Bath v. Earl of Bradford, 2 Ves 590	127, 195
—— Buckingham v. Drury, 1 Ed 71, 72	67, 138
—— Poinfiet v. Lod Windsor, 2 Ves 472	284
—— Portsmouth v. Fellows, 5 Madd 450	266
——— v. Lord Effingham, 1 Ves 435	29
——— Stamford, <i>Re</i> , (1896) 1 Ch 238	266
✓ Earl Sheffield v. London and Joint Stock Bank, 13 A C 333	281
Earlom v. Saunders, Amb 242	148
East, 8 Ch Ap 735	310
——, v. East, 5 Hare 343	88
Eastern Counties Rail Co. v. Hawkes, 5 H L Cas 331	96
Eastwood v. Clarke, 23 Ch D 134	224
Eaton v. Watts, 4 Eq 151	49
Eaves v. Hickson, 30 Beav 136 (142)	131, 181
———v. ———, 30 Beav 236	229
Ecclesiastical Commrs v. Pinney, (1900) 2 Ch 736	96, 171
Edgar v. Plomby, A C 431 (1900)	300
Edwards v. Grove, 2 De G F and J 222	263
——— v. Lewis, 3 Atk 538	341
Eghert v. Butter, 21 Beav 560	299
Egmont v. Smith, 6 C D 469	101
Eland v. Eland, 4 M and Cr 427	209
———v. ———, 1 Beav 235	208
Eldridge v. Knott, Cowp 214 (215)	283
Eloy v. Read, 76 L J N S (C A) 39	342

	PAGE
Eller, 17 Eq 409 ...	257
Elliot v. Ince, 7 De G M and J 488 ...	58
— v. Merryman, Barn 781 ...	206
Ellis v. Barker, L R 7 Ch App 104 ...	109, 110, 184
— v. Ellis, 23 W R 382 ...	49
Ellison v. Aving, 1 Ves Sen 111 ...	235
— v. Ellison, 6 Ves 656 ...	52, 326
Elvidge v. Bellingham, 37 Sol J 600 ...	156
Elseworth and Tidy's Contract, <i>Re</i> , L R 42 Ch D 23 ...	186
Emma Silver Mining Co v. Grant, 11 Ch D 918 ...	343
Emmet, <i>Re</i> . Emmet v. E., 17 C D 142 ...	130, 146, 147
England v. Downs, 6 Beav 279 ...	82
English and Scottish Company v. Branton, (1892) 2 Q B 709 ...	28
English Investment Co. v. Branton, (1892) 2 Q B 700 ...	21
Evans v. Bicknell, 6 Ves 174 ...	161
Ernest v. Crozdill, 2 De Gex F and G 198 ...	290
Etchells v. Williamson, WN 1869, p 61 ...	250
Etty v. Bridges, 2 Y and C C C 486 ...	261
Evans, <i>Re</i> , L R 34 Ch D 597 ...	170
— v. Benvon, 37 Ch D 329 ...	174, 280
— v. Bicknell, 6 Ves 174 (190) ...	255
— v. Jackson, 8 Sm 217 ...	198
— v. John, 4 Beav 36 ...	69
— v. Kackson, 8 Sm 217 ...	189
Everett v. Pythburgh, 12 Sm 365 ...	269, 270
— v. Everett, 10 L R Eq 405 ...	168
Evroy v. Nicholas, 2 Eq Ca Ab 438 (489) ...	67, 138
Executors of Fergus v. Gore, 1 Sch and Lef 110 ...	80
Exhall Coal Company, <i>Re</i> , 35 Beav 449 ..	169
Exre, <i>Re</i> , 49 L J N S 259 ...	221
— v. Countess of Shaftesbury, 2 P Wms (103, 108, 121, 124) ...	323

F

Fane, 41 L J 551 ...	166
Farmer v. Dean, 32 Beav 327 ...	201, 272
Farr v. Sheriffe, 4 Ha 528 ...	212
Farrant v. Blanchford, 11 W R 178 ...	142, 143
Fawcett v. Whitehouse, 1 R and M 132 ...	342
Fazakerlay v. Cushaw, 19 W R 793 ...	192
Fearn v Young, 9 Ves 519 ...	102
Feistel v. King's College, 10 Beav 491 ...	61
Fenars v. Cherry, 2 Vern 384 ...	291
Fenwick v. Greenwell, 10 Beav 412 ...	130, 131
Ferns v. Young, 10 Ves 184 ...	166
Field v. Danaughemore, 1 Dru and Wr 227 ...	326
— v. Field, 1894 1 Ch 425 ...	89, 160, 162
— v. Peckett, 29 Beav, 568 (576) ...	125, 185
Filnay v. Howard, 2 Dru and War 490 ...	265
Finch v. Finch, 15 Ves 43 at 50 ...	332
— v. Pescott, 17 L R Eq 554 ...	164
— v. Mullins, 1 Drew 308 (311) ...	181

	PAGE
Fish v. Attorney-General, L R 4 Eq 521	387
Fisher and Haslett, <i>Re</i> , B L R Ir 546	222
Fisk v. At-Gl, 4 L R Eq 521	33
Fiskhan v. Peel, 28 W R 941	288
Fist v At-Gl., Dawson v. Small, Lewin on Trusts, 11th Ed p 119	33
Fitzgerald v. Burk, 2 Atk 397	19
—— v. Jervoice, 5 Madd 25 (29)	125, 147
—— v. White, 37 Ch D 18	826
Fitzherbeit v. Matheo, 1 P R 12	31
Flekton v. Bunning, 8 L R Ch App 323 (n)	297
Fletcher v. Ashburner, 1 B C C 499	148
—— v. Green, 38 Beav 426 (519)	149, 157, 245
Flockton v. Bunning, L R 9 Ch 323 (n)	296
Flower, <i>Re</i> v. The Metropolitan Board of Works, 27 Ch D 592	211
Fludger, <i>Re</i> , Wingfield v. Erskine, (1898), 2 Ch 562	288
Foby v. Wontner, 2 J and W 245*	196, 223, 323
Foley v. Bonell, 1 B C C 277	268
Folower and The Metropolitan Board of Works, <i>In re</i> , 27 Ch D 592	154
Foone v. Blount, Cowp 467	147
Forbes v. Peacock, 11 Sim 152	207
—— v. ———, 1 Ph 717	208
—— v. Ross, 2 B C C 430	120, 244
—— v. ———, 2 Cox 113	120
Ford v. Chesterfield, 16 Bea 516	72
—— v. Hopkins, 1 Salk 288	287
—— v. White, 16 Beav 120	259, 291, 301
Fordhan v. Wallis, 10 Hare 217	130
Forshaw v. Higginson, 20 Beav 485	303, 304, 305
—— v. ———, 8 De G M & G 827	98, 183, 201
Forster v. Abraham, L R Eq 351	312, 351
—— v. Daires, 4 De G F and J 133...	266
Forster v. Dawber, 1 Dr and Sm 172	219
Fortescue v. Barnett, 3 Myl and K 36...	101
Foster v. Cockerall, 3 Cl and F 456, 475	101
—— v. Crabb, 11 C B 136	161
—— v. Dawber, 1 Dr and Sm. 172	70
Foveaux, <i>Re</i> Cross v London Antivivisection Society, 2 Ch.501	64
Fowler v. Garlike, 1 R and M 232	330, 334
—— v. Odell, 16 Ch D 723	86, 191
—— v. Vyatt, 24 Beav 232	181
Fowkes v. Pascoe, L R 10 Ch App 343...	331
Fox v. Buckby, 3 C L D 508	299
—— v. Mackroth, 2 B C C 400	241, 276
—— v. ———, 2 Cox 320	145
Francis v. Francis, 5 De G M and G 108	99, 286
Fraser v. Murdock, 6 App Cas 855*	168, 172, 186
Fraye v. Jones, 17 L J Ch 358	23
Frederick v. Hartwell, 1 Cox 193	124
Freeman v. Fairlie, 3 Mer 24 (43)	90, 114
French v. Holson, 9 Ves 103	142
Fright <i>Re</i> , 13 Ch D 628	352

	PAGE
Fright v. Earl of Plymouth, 3 Atk 480	230
Frith <i>Re</i> , (1902), 1 Ch 342 ...	170
— v. Cartland, 2 H and M 417	91, 282
— v. ———, 34 L J Ch 301	324
Frost v. Greateorex, (1900) 2 Ch 541	358
Fry v. Fry, 27 Beav 144	125, 126, 202
— v. Gapson, 28 Ch D 268	196, 228
Fryer, <i>In re</i> , 3 K and J 817	153
Fuller, <i>Re</i> , 2 Ch 551	310
— v. Knight, 6 Beav 205	173
— v. ———, 6 Beav 470	124
— v. Redman, 26 Beav 614	185
Fyler v. Fyler, 3 Beav 550	343

G

Gabb v. Prendergast, 3 Eq Rep 648	33
Gadd, <i>Re</i> , L R 23 Ch D 194	312
Gallard, <i>Ex parte</i> , (1897) 2 Q B p 15	276
Game, <i>Re</i> , Game v. Young, 1897 1 Ch 881	104
Games v. Hannyngton, 22 Beav 627	255
Gardner, 33 Ch D 590	317
— v. Downes, 22 Beav 395	305
— v. Smith, (1901) 1 Ch 697	37
Garner v. Hannyton, 22 Beav 627 (630)	160, 161, 254
— v. Moore, 3 Drew 277	186, 187, 224
Garnett, <i>Re</i> , 31 Ch D (C A) 1	143
Garrard v. Lord Landerdale, 3 Sim 1	326
Garrett v. Noble, 6 Sim 504	125
Garrick v. Errington, 2 P W 361	398
Garth v. Cotton, 2 Ves 524	112
— v. ———, 1 Dick 183	111, 112
— v. ———, 3 Atk 751	192
Gaskell v. Gaskell, 2 Y J 502	52
— v. Harman, 11 Ves 489	86
Gaskells v. Chambers, 26 Beav 360	349
Gaunt v. Taylor, 2 Beav 346	212
George v. George, 35 Beav 382	187
— v. Gaggat, 2 Sm L C (1896), 135	22
Gibbins v. Taylor, 22 Beav 344	99, 156
Gibert v. Gonard, 52 L T 54	289, 295
Giblin v. Mc Mullen, L R 2 P C 817	87
Gibson v. Smith, 2 Atk 182	112
Gilbert v. Overton, 2 H & M 110	57
Gillespie v. Alexander, 3 Russ 137	289
Gilroy v. Stephens, 30 W R 755	146
Gisborne 2 A C 300	194
— v. Gisborne, 2 App Cas 300	100, 183, 188, 224
Gladson v. Staneman, 1 Madd 143 (note).	269
Gladstone v. King, 1 M & S 35	31
GloUGH v. Bond, 3 My and Cr 490	233
Glover v. Rogers, 11 Jur 1000	72

	PAGE
Gluckstein v. Barnes, (1900) A C 240 ...	342
Godfrey v. Poole, 13 A C 497 ...	214
Godolphien v. Godolphien, 1 Ves 23 ...	183
Godory v. Warson, 3 Atk 518 ...	237
Goldney v. Bower, 1 J and H 247 ...	162
Gompertz v. Kensit, 26 L J 95 ...	165
Goode v. Burton, 11 Jur 851 ...	86, 160, 254
Goodenough, <i>Re</i> , 1895 2 Ch 537 ...	108
—— v. Trenamonde, 2 Bea 512 ...	106
—— Marland v. Williams, (1895), 2 Ch 537 ...	144
Goodier v. Edmunds (1893) 3 Ch 455 ...	39
Goodright v. Wells, Dougl 747 ...	17
Goodson v. Ellisson, 3 Russ 583 (594) ...	179, 248, 249, 250, 257
Goodwin v. Gosnell, 2 Coll 457 ...	77, 135
Gordon v. Frail, 8 Price 416 ...	164
—— v. Jones, 30 Ch D 249 ...	18
Gorges v. Pye, 7 B P C 224 ...	281
Goring v. Bickerstaff, 1 Ch Ca 8 ...	257
Gorton, <i>Re</i> , L R 40 Ch D 536 (543) ...	170
Gosling v. Gosling, Johns 265 ...	251
Gould v. Flectwood, 33 P Wms 251, note A ...	236
Gouth v. Smith, 1872. W N 18 ...	212
Gower v. Mamwarring, 2 Ves 87 ...	263
Graham v. M'Coshin, (1901) 1 Ir R 404 ...	217
Graig v. Wheeler 29 L J Ch 374 ...	105
Grant v. Grant, 34 Beav 623 ...	53, 73
—— v. —, 34 L J Ch 641 ...	68
Graves, <i>Ex parte</i> , 25 L J Bkcy, 53 ...	81, 83
—— v. Strahan, 8 D M G 291 ...	82
Gray v. Haig, 20 Beav 219 ...	114, 295
—— v. Lewis, 8 L R Eq 526 (543) ...	290
—— v. Siggers, 15 Ch Div 74 ...	132
—— v. Warner, 16 Eq 577 ...	275
Grayburn v. Clarkson, L R 3 Ch App 605 (606) ...	107, 125, 132
Great Berlin Steamboat Co., <i>Re</i> , 26 C D 616 ...	286
Greaves v. Powell, 2 Vern 248 ...	218
Green, <i>Ex parte</i> , 1 J and W 283 ...	193
—— v. Britten, 1 De G J and S 655 ...	105
—— v. Folgham, 1 S and S 398 ...	62
—— v. Spicer, 1 R 8 M 395 ...	37
Greenham v. Gibbeson, 10 Bing 363 ...	75, 121
Greenhouse, <i>Ex parte</i> , 1 Madd 92 ...	266
Greening v. Beckford, 5 Sum 195 ...	261
Green's Trust, <i>In re</i> , 6 J (N.S.) 386 ...	179
Greenwood v. Wakeford, 1 Beav 576 ...	305
Gregory v. Gregory, Jac 681 ...	271
—— v. —, G Coop 201 ...	271, 273, 275
—— v. Edmondson, 39 C D 253 ...	50
Griffin, <i>Ex parte</i> , 2 Gl and J 116 ...	210, 232
—— v. Griffin, 1 Sch and Lef 352 (354) ...	55, 341
Griffiths v. Porter, 25 Beav 236 (241) ...	141, 172

	PAGE
Grigby v. Cox, 1 Ves 518 ...	300
Grindey, <i>Re</i> , Clews v. Grindey, 2 Ch 593	84
Grove v. Price, 26 Beav 103 ...	85
Gude v. Worthington, 2 De G and Sm 389	190
Gumbert, <i>Re</i> , 16 Jur 852 ...	311

H

Hacketh v. M'Nawara, Ll and G Rep t Plunket 283	123, 198
Hadley, <i>Ex-parte</i> , 5 De G and Sm 67 ...	223, 308
Haldenby v. Spofforth, 1 Beav 390 ..	123, 199
Hale and Clarke, <i>Re</i> , 55 L T N S 151 ...	248
—————, <i>Re</i> , 55 L J N S Ch 550	248
—————, 34 W R 621	248
Hall, <i>In re</i> , 54 L J N S Ch 527	78
—— v. Franck, 11 Beav 519 ..	49, 162, 232
—— v. Hall, L R 1 P and M 481	347
—— v. Hallet, 1 Cox 134 (139, 141)	145, 273, 276
—— v. Heward, 32 Ch D C A 430 ..	342
—— v. Nove, 3 Ves 748 .	271, 275
—— v. ——— 12 Ves 374 ...	241
—— v. Warren, 9 Ves at p 610 (611)	58 59
Hallet, 13 Ch D 696 ...	293
—— and Co., <i>Re</i> , 2 Q B 237	287, 288, 294
Hallett's estate, <i>In re</i> , 13 Ch D 696 ..	287, 295
Hallows v. Lloyd, 39 Ch D 686 (691)	81, 82, 313, 322
Hamilton, <i>Re</i> , 2 Ch (C A) 617	148
——, <i>Trench v. Hamilton</i> , (1895) 2 Ch p 373	46, 50
—— v. Waring, 2 Bligh 209 ...	93
Hanbury v. Kirkland, 3 Sm 265	150
—— v. Latchfield, 2 M & R 633	27
Hanchett v. Briscoe, 22 Beav 496	143
Hanson v. Gardiner, 7 Ves 307	112
Harbin v. Darby, 28 Beav 325 .	236
Harcourt v. Seymour, 2 Sm N S 45	148
—— v. White, 28 Beav 303 ..	79
Hardcastle, <i>Ex-parte</i> , 29 W R 615	291, 295
Harden v. Parsons, Eden 145 (147)	154 300
Harding v. Glyn, 1 Atk 469	46
Hardly, <i>Re</i> , 5 De G and Sm 67 .	318
Hardoon v. Behilos, (1901), A C 118	171, 172
Hardwick v. Mynd, 1 Aust 109	100, 195
Hardy v. Caley, 33 Beav 365	135, 168, 343
Harford v. Lloyd, 20 Beav 310	286
Harland v. Bugs, 15 Q B Rep 713	326
—— v. Trigg, 1 B C C 142	45
Harnard v. Webster, Sel Ch Ca 53	133
Harper v. Harper, 2 Giff 210	197
—— v. Hayes, 2 Giff 210	123
Harris v. Payne, 1 Drew 187	104
—— v. Truman, 9 Q B D 264	282
Harrison v. Forth, Pr Ch 51	291

	PAGE
Harrison v. Graham, 1 P W 241 (M) ...	69
— v. —, 3 Hills M S S 239 ...	222
— v. Harrison, 2 H and M 237 ...	335
— v. Randall, 9 Hare 407 ...	183
— v. Thexton, 4 Jur N S 550 ...	88, 89
Harrison's Trusts. <i>Re</i> , 22 L J Ch 69 ...	309
Harryman v. Collins, 18 Beav 11 ...	28
Hartley v. Burton, 3 L R Ch App 365 ...	249
Harvey v. Olhver, 57 L T 239 ...	91, 150
— v. — 59 L T N S 249 ...	313
— v. — W N 1887 p 149 ...	165
— v. — (1887) W N 439 ...	313
Hatchkeys, <i>Re</i> , L R 32 Ch D 408 ...	191
Havelock v. Havelock, L R 17 Ch D 807 ...	193
Hawley v. Blake, (1904) 1 Ch 622 ...	216
Hayer v. Outley, 14 L R Eq 1 ...	253
Hayes v. Kingdome, 1 Vern 33 ...	330
Head, <i>Re</i> , 45 Ch D 310 ...	75, 348
— v. Gould, (1898) 2 Ch 250 (265, 273 274) ...	96, 156, 309
— v. Lord Teynham, 1 Cox 57 ...	250
Heap v. Jones, 5 W R 106 (Eng) ...	71
Heartley v. Nicholson. L R 19 Eq 233... ..	53
Hensman v. Pearse, 25 L J 121 ...	216
Heathorne v. Darling, 1 Moo P C 5 ...	23
Hebble v. Payne, 54 L J 840 ...	239
Hercy v. Dinwoody, 2 Ves 87 (93) ...	276, 284
Hethersell v. Hales, 2 Ch Rep 153 ...	168
Hetley, <i>Re</i> , H V H, (1902), 2 Ch 866 ...	46
Hewitt v. Loosemore, 9 Hare 449 (455) ...	20, 21
Hext v. Gill, 7 Ch 700 ...	112
Hickley, 2 Ch D 190 ...	243, 244
Hicks v. Hicks, 3 Atk 274 ...	144
Hide v. Haywood, 2 Atk 126 ...	168
Hiern x. Mill, 13 Ves 114 ...	22
Higginbottom, <i>Re</i> , 3 Ch 132 ...	320
— v. Hawkins, L R 7 Ch App 676 ...	349
— v. Holme, 19 Ves 88 ...	38
Higgins v. Shaw, 2 Dr and War 361 ...	28
Higginson v. Kelly, 1 B and B 252 ...	38
Hill v. Boyle, 4 L R Eq 260 ...	257
— v. Crook, 6 L R H L 265 ...	33
— v. Hill, (1897) 1 Q B (C A) 483 ...	49
— v. Magan, 2 Moll 460 ...	169
— v. Reardon, 2 Russ 603 ...	63
— v. Simpson, 7 Ves 152 ...	209
— v. Teenery, 23 Beav 16 ...	131
Hillary v. Walker, 12 Ves 206 ...	283
Hisk v. Webb, Pr Ch 84 ...	286
His Late Majesty, <i>In the Goods of</i> , Geo. III, 3 Sw and Tr 199 ...	58
Hitchens v. Congrave, 1 R and M 150 ...	343
Hoare v. Osborne, L R 1 Eq 585 ...	9

	PAGE
Hobbs v. Waijet, 36 Ch D 256	171
Hobday v. Peters, 28 Beav 603	181
Hobson v. Bell, 2 Beav 17 (23)	101, 200
— v. Trevor, 2 P Wms 191	61
Hodger v. Hodger, 2 Keen 704	258
Hodges, <i>In re</i> , v. Ward 7 C D 762	77
Hodson v. Cash, 1 Jur N S 864	212
Hogg v. Greenway, Coryton 97	5
Holdsworth, <i>Ex parte</i> , 4 Bing N S 386	253
Holford v. Phipps, 3 Beav 434 (440)	124, 250
Holgate v. Haworth, 17 Beav 259	145
— v. Gennings, 24 Beav 623	104
Holliday v. Hudson, 2 Ves 210 (211)	385
Holloway v. Radcliffe, 23 Beav 163	248, 253
Holmes, <i>Re</i> , 29 Ch D (C A) 786	261
— v. Dring, 2 Cox 1	118
— v. Penney, 3 K and J 103	110
— v. Powell, 8 De G M and G 572	26
Holt v. Holt, 1 Ch Ca 190	342
— v. Sindrey, 7 L R Eq 170	33
Honywood v. Honywood, L R 18 Eq 306	349
Hope v. Hope, 1 Jur N S 770	103
— v. Johnstone, <i>Re</i> , 1 Ch 470	36
Hopkins v. Goman, 1 Moll 561	288
— v. Myall, 2 R and M 86	251
Horde v. The Earl of Suffolk, 2 M and K 59	110
Horton v. Brockbehurst, 29 Beav 504	114, 249
Hosegood v. Pedler, 66 L J Q B 21	171
Hoskin, <i>Re</i> , 5 Ch D 229	182
Hotchkys, <i>Re</i> , Preke v. Calmady, 32 Ch D 408 (420)	101, 179
Houghton, <i>Re</i> , Hawley v. Blake, (1904), 1 Ch 622	90, 186, 215
House v. Way, 12 Jur 958	102
Hovendon v. Lord Annesley, 28 Ch and Lef 634	283
Howard v. Pupera, 1 Madd 143	269
— v. Rhodes, 1 Keen 581	306
Howarth, 8 Ch A 415	192
Howe v. Lord Dartmouth, 7 Kes 137 (151)	103, 104, 108, 132
— v. ———, 1 Wh and Tu 68	111
— v. Lord Winterton, 51 W R 26	165
Howkins v. H 1 Dr and Sm 75	133
Huchinson and Tenant, <i>Re</i> 8 Ch D 540	45
Huchson v. Hammond, 3 B C C 128	186
Hudson, <i>Re</i> 33 W R 819	186
Huges, <i>Ex parte</i> 6 Ves 616 (617, 622, 624)	195, 241, 277, 304
— v. Empson, 22 Beav 181 (183)	124, 201, 202
— v. Stubbs, 1 Hare 476	52, 77
— v. Wells, 9 Hare 773	189
— v. Wynne, T and R 307	79
Huguenin v. Besely, 14 Ves 273	345
Hulme v. Hulme, 2 M and K 682	311
— v. Fennant, 1 Bro C C 20	300

	PAGE
Humphrey, 22 Ch D 255 ...	165
— v. Morse, 2 Atk 408 ...	221
Hunt v. Elmes, 2 D F and J 578 ...	23
— v. Luck, (1902) 1 Ch 429 ...	23
— v. Parry, 32 Ch D 382 ...	193
— v. Scott, 1 De G and Sm 219 ...	107
Hunter v. Bullock, L R 14 Eq 45 ...	337
Hunton v. Davies, 2 Ch Rep 44 ...	234
Hurst v. Hurst, 9 L R Ch App 762 ...	76
— v. Addison v. Topp, 67 L T 96 ...	76
Hutchinson and Tenant, <i>Re</i> , 8 C D 540 ...	50
Huxtable, <i>Re</i> (1902) 2 Ch (C A) 793 ...	43
Hyde v. Warden, L R 3 Ex D 72 ...	28

I

Ingle v. Partridge, 34 Beav 412 ...	96
— v. ——— 32 Beav 661 ...	98
— v. Richards, 28 Beav 361 ...	272
Irby v. Irby, 24 Beav 525 ...	226
— v. ———, 30 Beav 632 ...	301
Isaac, <i>Re</i> , 1897, 1 Ch 251 ...	233

J

Jackson, <i>Re</i> , 44 L T N S 467 ...	143
— 21 Ch D 786 ...	177
— v. Dickinson, 1 Ch 947 ...	156
— v. Rowe, 2 S and S 472 ...	22
Jacob v. Lucas, 1 Beav 436... ..	223, 323
Jacobs v. Rylander, L R 17 Eq 341 (351) ..	173, 292, 298, 300
Jagger v. Jagger, L R 25 Ch D 729 ..	164
Jago v. Jago, 68 L T 654 ...	71
James, <i>Ex parte</i> 1 D and C 272 ...	169
— v. ——— 8 Ves 337 (351, 352) ...	240, 241, 243, 273, 274, 276, 277, 278
— v. Coachman, 29 Ch D 212 at 217 ...	168
— v. Dean, 11 Ves 383, at p 392 ...	349
— v. Frearson, 1 Y and C C C 370 ..	69, 83, 221
— v. May, 6 H L 328 ..	165, 171
Jeffreys v. Marshall, 23 L J 548 ...	166
Jenkins v. Milford, 1 J and W 629 ..	245
— v. Morris, 14 Ch D 674 ..	58
Jenks v. Holford, 1 Vern 62 ...	62
Jennies v. Morris, 1 Ch 603 ...	255
Jennings v. Matter, (1901), 1 K B 106. .	170, 185
— v. Sellick, 1 Vern 467 ...	331
Jervis v. Wolferstan, 18 L R Eq 18 ...	171
Jervoise v. Silk, G Coop 52. .	193
Jesse v. Bennett, 6 D M G 609 ...	157
Job v. Job, 6 C D 562 ...	87
Jobson v. Palmer, 1 Ch 71 ...	87
Johns v. James, 8 Ch D (C A) 744 ...	325, 326, 327

	PAGE
Johnson v. Johnson, 2 Coll 441	102
— v. —, 15 Ch D 548	168, 170
— v. Kennel, 3 M and K 624	207, 208
— y. Newton, 11 Hare 160	99
Jones v. Badley, (1868) 3 Ch A C 362	55
— v. Blake, 29 Ch D 913	225, 226
— v. Gibbons, 9 Ves 410	158
— v. Greaves, 2 Ch 683	205
— v. Higgins, 2 Eq 538	69, 89, 140
— v. Lewis, 1 Cox 199	249
— v. —, 2 Ves Sen 240	86, 87, 95
— v. Lock, L R 1 Ch Ap 25	53, 54
— v. Owen, 1 Ch 807	169
— v. Powell, 4 Beav 96	224
— v. Scott, 1 R and M 255	214
— v. Smith, 1 Hare, p 43	22, 24, 26
— v. Stohwasser, L R 16 Ch D 577	209
— v. Williams, 24 Beav 47	23
— v. —, Amb C 651	14
Jorden v. Money, 6 H L C 185	140
Josselyn v. Josselyn, 9 Sim 63	249, 253
Justice v. Wynne, 12 L Chan Rep 289, 299	101, 260

K

Kater v. Prembroke, 1 B and C 302	352
Kaye v. Powel, 1 Ves Jun 408	246, 249
Kearsley, <i>Ex parte</i> , 19 Q B D 1	268
— v. Woodcock, 3 Ha 185	251
Keave v. Roberts, 4 Madd 332	339, 343
Keble v. Thompson, 3 B C C 112	135
Keech v. Sandford, 2 W and J	238
Kekewich v. Manning, 1 De G M & G 176	57
Kelly v. Nichols, 17 R T 306	39, 65
Kennedy v. Daly, 1 Sch and Lef 381	91, 291
— v. De Trafford, 1897, A C 180, 189	273
— v. — (1896) 1 Ch 762	342
Kennell v. Abbott, 4 Ves 802	340
Kennedy v. Browne, 3 Ridg 519	277
Kent v. Jackson, 14 Beav 367 (384)	139, 140, 284
Kidney v. Cousmaker, 12 Ves 158	285
Kilbee v. Sneyed, 2 Moll 195 (199, 203, 233)	99, 143, 229
Kildare v. Eustace, 1 Vern 439	66
Kilworth v. Mountcashell, 15 G R Ch Rep 565	299
Kimber v. Barber, L R 8 Ch App 56	343
Kindal v. Ward, L R 6 Ex 248	344
Kindell v. Ganger, 5 Beav 300	330
King, <i>Re, Ex parte</i> , 2 M and A 410	298
— v. Archbishop of canterbury, 15 East 117	184
— v. Bellard, 1 H and M 343	321
— v. Denison, 1 V and B 279	334
— v. Mullins, 1 Drew 311	181

	PAGE
King, v. Ral, L J 27th May, 1858 ...	226
Kingdom v. Bridges, 2 Y 67 ...	332
— v. Castleman, 46 L J Ch 448 ...	90, 131
Kingsman v. Kingsman, 2 Vern 559 ...	43
— v. — 6 Q B D (C A) 122 ...	206
Kingston, <i>Ex parte</i> , L R 6 Ch App 632... ..	98
Kinlock v. Secretary of State for India in Council, 15 Ch D (C A) 1 ...	11, 66
Kirby v. Mash, 3 Y and Col 95 ...	269
Kirkman v. Booth, 11 Beav 273 ...	81
Knapman, <i>In re</i> , 18 Ch D 300 ...	258
Kneeling v. Child, Rept Finch 360 ...	269
Knight, <i>Re</i> , 26 Ch D 82 ...	310
— v. Boughton, 11 Cl and F 513... ..	49
— v. Browne, 7 Jur N S 894 ...	38
— v. Lord Plymouth, 3 Atk 480 ...	228
— v. Majonbanks, 2 Hall and T 308 ...	241
— v. Majonbanks, 2 M and G 10 ...	244
Knight's Trust, <i>Re</i> , 27 Beav 45 ...	177
Knot v. Cotte, 16 Beav 80 ...	147
Knox, 195 (2 Ch. 482) ...	165

L

Lacey, <i>Ex parte</i> , 6 Ves 625 (626, 628, 629), 630 ...	240, 242, 271, 278, 279
Lako, <i>In re</i> , (1903) 2 K B 151 ...	30
— v. De Lambert, 4 Ves 595 ...	67
Lambe v. Eames, 6 Ch 597... ..	46, 50
Lambert, <i>Re</i> , 2 Ch 180 (1897) ...	277
Lamplugh v. Lamplugh, 1 P W 112 ...	67
Lancaster Charities, 7 Jur N S 596 ...	267
Lancaster v. Evers, 10 Beav 154 ...	239
Lane v. Debenham, 1 Hare 188 ...	184, 196
— v. Dighton, Amb 409 ...	294
La Neve v. La Neve, 2 W and T L C 175 ...	30
Langdale v. Briggs, 8 De G M and G 391 ...	255
Langley v. Fisher, 9 Beav 90 ...	91, 239
Langston, v. Ollivant, G Coop 33 ...	119
Langton v. Astrey, 2 Ch Rep 30 ...	290
Law v. Debeham, 11 Hare 188 ...	223
Lawledge v. Tyndall, (1896) 1 Ch 423 ...	350
Lawrence v. Bowle, 2 Phill 140 ...	157
Laxenburg R W v. Magnay, 25 Beav 586 ...	343
Leadham v. Chawner, 4 K and T 458 ...	165
Leake v. Robinson, 2 Merivale Rep 363 ...	39
Learoyd v. Whiteley, 12 Ap Ca 727 (733) ...	94, 117, 118, 122, 229
Leather v. Leather, 5 C D 221 ...	255
Lechmere v. Earl of Carlisle, 3 P W 215 ...	147
— v. Lavie, 2 M and K 197 ...	49
Lee v. Brown, 4 Ves 362 ...	194
— v. Stanley, 15 Eq 204 ...	135, 168, 207, 215, 232
— v. Young, 2 Y and C Ch C 532 ...	234, 265
Leedham v. Chawner, 4 K and J 458 ..	75, 164, 171

	PAGE
<i>Lefthouse, Re</i> , L R 29 Ch D 921	193
<i>Legg v. Macknell</i> , 1 Giff 165	306
<i>Leisharn v. Chawner</i> , 4 K L J 458	248
<i>Lemann</i> , 22 Ch D 633	310, 319
<i>Leslie v. French</i> , 2 and 3 Ch D 552	349
<i>Lester v. Lester</i> , 6 Ves 6 33	274
<i>Letherstedt v. Broers</i> , L R 9 Ap C A 371	265, 319
<i>Lewis, Ex parte</i> , 3 M D and D 173	90, 199
—, 1 G J and J 69	195, 201
<i>Lewis v. Hillman</i> , 3 H L C 607	124
— v. <i>Madocks</i> , 17 Ves 48	286, 293
— v. <i>Nobbs</i> , 8 Ch D 591 (595)	82, 97, 152, 162, 163, 233
— v. <i>Rumney</i> , J, R 4 Eq 451	185
<i>Lewsey v. Harding</i> , Taunt 460	234
<i>Lichfield v. Baker</i> , 2 Beav, 481	102
<i>Lickbarron v. Mason</i> , 2 T R 70	24
<i>Liddard Re</i> , L R 14 Ch D 310	321
— v. <i>Liddard</i> , 28 Beav 266	49
<i>Life Association of Scotland v. Siddad</i> , 3 De G F and J 72 (73, 74, 77) ...	141, 142, 143, 183
<i>Limbray v. Gurr</i> , 6 Madd 151	33, 337
<i>Lincoln v. Wright</i> , 4 Beav 427 (432)	135, 141, 173, 298
<i>Lingard v. Bromley</i> , 1 V and B 114	156
<i>Lippiatt v. Holley</i> , 1 Beav 423	217
<i>Lister and Co v. Stubbs</i> , 45 Ch D (C A) 113	342
<i>Livesay v. Harding</i> , 23 Beav 141	261
— v. <i>Livesay</i> , 3 Russ 287	172
— v. <i>O'Hara</i> , 14 Ir Ch Rep 12	77
<i>Llewellyn, Re</i> , L R 37 Ch D 317	166
<i>Lloyd v. Baldwin</i> , 1 Ves Sen 172	208
— v. <i>Banks</i> , L R 3 Ch 487 (490, (491)	19
— v. <i>Lloyd</i> , 2 Sim (N S) 255	35
— v. <i>Spillett</i> , 2 Atk 148	330
<i>Lloyds Banking Co. v. Jones</i> , 29 Ch D 221	82, 130
<i>Lloyd's Bank v. Pearson</i> , (1901) 1 Ch 865	260
<i>Locke v. Lomas</i> , 5 De († and S M 326	208
<i>Lockhart v. Reilly</i> , 1 D and J 464 (476)	89, 157
— v. —, 25 L J Ch 697	156
<i>Loddington v. Kennel</i> , 3 Beav 433	214
— v. <i>Kime</i> , 3 Lev 433	79
<i>London Bridge Acts, Re</i> , 13 Sim 176	198
<i>London Joint Stock Bank v. Simmons</i> , (1892) A C 201 (229)	21, 22
<i>Lord v. Godfrey</i> , 3 Madd 455	104, 107
— <i>Camoy's v. Best</i> , 19 Beav 414	303
— <i>Castlemain v. Lord Craven</i> , 22 Vin Abr 523	112
— <i>Cornbury v. Middleton</i> , 1 Ch Ca 211	257
— and <i>Fullerton's Contract, Re</i> , 1 Ch 228	71, 220, 222
— <i>Gainsborough v. Watcombe Terra Cotta Co.</i> , 54 L J Ch 991	145
— <i>Harderike v. Vernon</i> , 4 Ves 411 (416)	145, 276
— <i>Hotham's Trusts, In re</i> , L R 12 Eq 76	176
— <i>Lovat v. Duchess of Leeds</i> , 2 Dr and Sm 62	38

	PAGE
Lord Montford v. Lord Cadogan, 17 Ves 485 (489)	180, 178
— Montfort v. Lord Cadogan, 19 Ves 635	173
— Ponfret v. Lord Windesor, 2 Ves 476	91
— Ranelagh's Will, <i>Re</i> , L R 26 Ch D	349
— Stamford Ryne, <i>Re</i> v. Stamford, (1896) 1 Ch p. 301	180
Lorenze's Settlement, 11 Drew and Sm 401	178
Lovat v. Fraser, 1 L R N L Sc 37	164
— v. —, L R 1 H L 24	166
Lovegrove, <i>Es parte</i> , 3 D and C 763	165
Low v. Bouverie, 3 Ch 99	116
Lewis v. Rumney, 4 L R Eq 451	185, 215
Lowson v. Copeland, 2 B C C 156	84, 88, 144, 177
Lowther v. Caulton, 2 Atk 242	291
Luckyn Chunder Seal v. Koroanamony Dasee, 1 Boulnois 210	85
Luff v. Lord, 31 Beav 220	275
Luke v. South Kensington Hotel & Co, 11 Ch D 121	100, 210, 215, 216, 228
— v. —, L R 7 Ch D 789	232
Lunham v. Blundell, 4 Jur N S 3	98
Lupton v. White, 15 Ves 431 (432)	100, 282, 293
Lushington v. Boldere, 15 Beav 1	349
Lush's Trusts, <i>Re</i> , 4 L R Ch Ap 591	138
Luther v. Blaneon, 10 Ir Ch R 194	85
Lutifum v. Begogan, 5 W R 120	281
Lyell v. Kennedy, 14 A C 459	288
M	
Mabbett, <i>Re</i> (1891) 1 Ch 707 at 712	187
Macdonald, <i>Re</i> (1897) 2 Ch 181	232
— v. Irvine, 8 Ch D 101 (112, 121, 124)... ..	102, 104, 105, 107, 112
Macdonnell v. Harding, 7 Sim 178	98
Macket's <i>Re</i> Will, 1 Jobs 625	176, 178
Mackie v. Mackie, 5 Hare 70	104
Mackintosh v. Pngose, (1895) 1 Ch 505	38
Macnamara v. Jones, 2 Dick 587	165, 237
Macorwick v. Gorgon, L R 4 H L 88	340
Maereth v. Symonds, 1 W 330	352
Madden v. Madden, 23 L R Ir 167	221
Maddeson v. Andrew, 1 Ves 59	190, 234
Maddock Lewelyn <i>In re</i> , v. Washington, (1902) 2 Ch 220	329
Maddocks v. Wren, 2 Ch Rep 109	342
Maggeridge v. Grey, Nels 42	266
Magrath v. Morehead, L R 12 Eq 491	251
Maitland v. Bateman, 16 Sim 233 (n)	88
Mitra v. Bannister, Pr Ch 200 (note) 1	47
Malcolm v. O'Callaghan, 3 M M and Cr 52	165
Malim v. Koughley, 2 Ves Gun 836	45
Manchester and Country bank, <i>Es parte</i> , 39 W R 303 (Eng)	281
— Trust v. (1895), 2 Q B 539 (545)	22
Manning v. Gill, 13 L R Eq 495	39, 330
Mansel, <i>Re</i> , 54 L J N S Ch 883	226
Mansfield v. Shaw, 8 Madd 100	269

	PAGE
Manson v. Baillie, 2 Macq H L Cas 80	227
Manswell v. Manswell, 2 P W 678	230
Mara v. Browne, (1896), 1 Ch 199	168, 311
— v. —, (1895) 2 Ch 69 and 93	174
Marker v. Marker, 9 Hare 16	143
Markwell v. Markwell, 34 Beav 12	326
Marlow v. Pitfield, 1 P W 558	79
Marners' Trusts, <i>Re</i> , 3 Eq 432	192
Marriott v. Kinnersley, Taml 470	131
Marsdon v. Kent, 5 C D 598 (600)	126, 248
Marsh v. Lord Granville, 24 Ch D 11	201
Martin's <i>Re</i> , W ^N (1886) p 183	320
Massingford's Settlement <i>Re</i> , 68 L T N S 296, 299	75, 121
Matheson v. Goodwyn, 62 L T 217	108
Mathew v. Brise, 14 Beav 341	285
Mathias v. Mathias, 3 Sin and G 552	286
Mawing v. Gill, 13 L R Eq 485	337
Mawson v. Fletcher, 6 Ch 91	200
May v. Newton, 34 Ch D 347	131
Mayer v. Murray, 47 L J Ch 645	101
Mayor of Coventry v. Attorney-General, 7 B P C 235	266
M'Carthy v. Decaix, 2 R and M 615	143
McKenna v. Eager, 1r R 9 C L 79	71, 220
Mead v. Lord Orrey, 3 Atk 238	280
Medland, <i>Re</i> , Eland v. Medland, 41 Ch D 476	99
Memertshagen v. Davis 1 Coll 335	317
Mondes v. Guedella, 2 J and H 259	95, 97, 162, 163
Merodith v. Heneage, 1 Sim 534 (540, 542, 543)	46, 49
Mertins v. Joliffe, Amb 313	291
Messena v. Garr, L R 9 Eq 260 ... ..	...184, 187, 215, 232
Meux v. Bell, 1 Hare 95 ... ..	...160, 254, 255
Mickles, 1 Ch 630	109
Middlton v. Reay, 7 Ha 106	320
Midgley v. Midgley, (1893) 3 Ch 282	168, 185
Mildred v. Maspons, L R 8 A C 287	18
Miles v. Harrison, 9 L R Ch App 316	172
— v. Langley, 1 Russ and M 39	26
Millard v. Eyre, 2 Ves Jun 94	266, 303
Millar's Trustees v. Polson, 34 Sc L R 798	81, 151
Miller v. Miller, 13 Eq 263... ..	107
— v. Pridden, 1 D M and G 335	314
— v. Race, 1 Burr 452	293
Mills v. Fox, 37 Ch D 153	284
— v. Osborne, 7 Sim 30	88
Milroy v. Lord, 4 De G F J 274	53
Minch v. Cockerell, 5 M and Cr 179, 214	211
Minors v. Battison, L R 1 A C 428	187, 224
Mint v. Leman, 20 Beav 260 (269)	120, 203
Mitchelson v. Piper, 8 Sim 64 ... ..	... 187, 224, 225
Mitford v. Reynolds, 1 Ch 185	33, 337
— v. —, 16 Sim 105	46, 64

	PAGE
Moggridge v. Thackwell 3 B C C 528 ...	262
Mohan v. Stanhope, 2 Sug Pow 412 ...	109
Nolloy v. French, 13 Ir Eq R 261 ...	101
Molton v. Camroux, 2 Exch 487, 503, Affirmed in 1 Exch 17 ...	59
Molyneaux v. White, 13 L R In 382 ...	208
Nomit v. Parke, 2 Atk 52 ...	238
Nonie v. Bishop of Durham, 10 Ves 521 ...	46
Montfiore v. Guodella, 2 Ch 723 ...	310, 312
Montford v. Cadogan, 19 Ves 637 ...	69
Moodv, <i>Ex parte</i> 2 Rose 413 ...	135
Moons v. De Bernales 4 Russ 305 ...	130
Moonshee Buzzul Rahim, Shumsheroomussa Begum, W R (F B) 60 ...	130
Moore, <i>Re</i> , 55 L J N S Ch 418 ...	47
—— v. Bennett 2 Ch C 246 ...	28
—— v. Frowd, 3 My and Cr 45 (48) ...	84, 236
—— v. Pechell, 22 Beav 172 ...	29
—— Prior v Moore (1901) 1 Ch 936... ..	47
Moorecroft v. Dowding, 2 P Wins 314 ...	227
Morman Society, <i>Re</i> , 26 Beav 101 ...	309
Morgan, <i>Ex parte</i> 1 Hall and Tu 328 ...	140
—— v. Morgan, 14 Bea 72 ...	104, 105, 107
—— v. Munnett, L R 6 Ch D 638 ...	343
—— v. Stephens, 3 Giff 235 ...	135
Morice v. Bishop of Durham, 9 Ves 399 (405) ...	7, 334
—— v. ———, (1899) 1 Ch 21 ...	10
—— v. ——— London, 10 Ves 539 ...	55
Moris v Chambers, 28 Beav 246 ...	352
Morison v. Morison 7 De G M and G 226 ...	169
Morland v. Cook, L R 6 Eq 252 ...	29
Morley v. Morely. 2 Ch C 2 ...	86, 95
—— v. Remoldson, 2 Ha 570 ...	36
Morris v. Lavey, 1 Y and C C C 380 ...	259, 288, 301
—— v. Morris, 6 W R 93 ...	126
—— v Wright, 14 Beav 291 ...	204
Morse v. Roval, 12 Ves 355 (373 374) ...	244, 274, 279
Mortlock v Buller, 10 Ves 292 (309) ...	109, 127
Motiram v. Naran, Bom P J 1889 p 125 ...	328
Moxham v. Grant, 1 Q B 88 ...	173
Moyle v. Moyle 2 R and M 710 ...	83, 99
M' Queen v. Farguhas, 11 Ves 467 ...	199
Muckleston v. Brown, 6 Ves 68 ...	39
Mucklow v. Fuller, Jac 198 ...	70, 72
Mulhallen v. Marum. 3 Dr and War 317 ...	55
Mulvany v. Dillon, 1 B and B 409 ...	341
Munch v. Cockrill, 5 My and Crll 179... ..	231
Murphy, <i>Re</i> , (1900) 1 I R 145 ...	138
Murray v. Palmer, 2 Sch and Lef 486 (487) ...	279
Mussoorie Bank v. Raimor, 7 App Cas 331 (397) ...	45, 50
Mutual Life Assurance Society v. Langley, 32 Ch D 460 ...	261
—— Co., v. ———, 26 Ch D 686 ...	261
Myler v. Fitzpatrick, 6 Madd 360 ...	168

N

Nagle v. Bayler, 3 Dr and War 60 (73)	29
Nar-er v. Kiparam, (1877) B P J 26	..	..	..	27
National Bank of Australasia v. United Hand-in-Hand Co., 1 A C 391	...	...	...	124
National Trustees Company of Australasia v. General Finance Co of Australasia, (1905) A C 373	...	...	...	75
Naylor v. Armtt, 1 R and M 501	...	.	...	189
— v. Winch, 1 S and S 567	...	.	...	272
Neale v. Davies, 5 De G M and G 258	..	.	...	92, 239, 303
— v. Neale, 79 L T 629	...	...	...	59
Needham, Re, 1 J and Lat 31	...	..	...	69, 71
—, 6 Ir Eq R 557	...	..	...	71
— v. Bowers, 21 Q B D 136	...	...	...	8
Neeson v. Clarkson 1 Hale 27	...	..	.	349
Nehgan v. Roche, 7 I R Eq 332	...	...	...	69
Nelson v. Stocker, 4 De G and J 458	...	...	...	138
Nerrill, Re, 31 C D 161	...	...	...	78
Nether Stowey Vicarage, In re, L R 17 Eq 156	...	..	...	176
Nettlefold, Re, 59 L T 315	..	..	...	126, 225
Neville v. Fortesque, 16 Sm 333	...	...	...	106
New, Re, (1901) 2 Ch 534	...	.	...	78
— v. Jones Exch 9 Aug 1839	.	..	.	237
— v. —, 1 Mac and G 668	..	...	...	236
Newen, Re, (1893), 2 Ch 369	...	..	...	161
—, (1894) 2 Ch 297	...	...	...	256
Newman v. Sindlan, 81 L J 421	...	..	...	188
— v. Sindana, 81 L T 421	..	...	.	202
Newport v. Barz, 23 Beav 30	...	.	...	236
Newsome v. Flowers, 30 Beav 461	...	...	...	91, 92
Newton v. Askew, 11 Beav 145	...	.	...	326
Nicholson v. Field (1893) 2 Ch 511	...	.	...	315, 318
— v. Juton, 2 K and J 23	...	...	.	326
— v. Wordsworth, 2 Swans 372	...	...	...	219
— v. Wright, 26 L J 312	..	...	...	318
Nickisson v. Cockhill, 3 De G and J and S 622	..	..	...	189
Nicloson v. Wordsworth, 2 Swans 372	...	...	...	70
Nicoll's Estates, Re W N 1878	..	.	...	166
Niel v. Morley, 9 Ves 478 (481)	...	...	...	58
Noble v. Edwards, 8 Price 165	..	.	...	196
— v. Maymott, 4 Bea 471	..	.	...	71, 221, 308, 311, 318
Norbury v. Calbeck, 2 Moll 461	...	.	...	115
Norrington, Re Brindley v. Partridge, 13 Ch D 654	...	...	...	125, 271
Norris v. Wright, 14 Beav 291 (303)	...	...	...	121
Northeu v. Cornegie, 4 Drew 587	...	...	...	330
Northington, In re, 13 Ch Div 654	..	...	...	132
Norton v. Pritchard, Reg Lib B (1844) 771	...	...	...	96
Norway v. Norway, 2 M and K 278	..	...	...	71
Nunn v. Wilsmore, 8 J R 521	...	...	...	218
Nutt v. Easton, (1899) 1 Ch 873	...	..	...	344

	PAGE
O	
Oakes v. Strachey, 13 Sim 414 ...	102
Oatway, <i>Re</i> (1903) 2 Ch 356 (360) ...	282
—— Hertslet v. Oatway, (1903) 2 Ch 356 ...	293
Oceanic Steam Navigation Co. v. Sutherberrey, 16 Ch D (C A) 236 ...	198, 202
Ogle, <i>Ex parte</i> , L R 8 Ch 711 (715, 716) ...	89, 131, 144, 210, 213
O'Keefe v. Calthorpe, 1 Atk 18 ...	265
Oliver v. Court, 8 Price 165 (166, 167, 172) ...	196, 197, 275, 277, 284
Ord v. Noel, 5 Madd 438 (440) ...	100, 123, 195, 196, 197
—— v. White, 3 Beav 357 ...	258, 291
Orde <i>Re</i> , 24 C D 271 ...	318
O'Reilly v. Alderson, 8 Hare 101 ...	266, 267
Orme v. Wright, 3 Jur 19 ...	196
Ormsby, <i>Re</i> 1 Ball and B 189 ...	235
Orr v. Newton, 2 Cox 274 (276) ...	83, 88
Osburne, 6 Ves 455 ...	180
Ottley v. Gilbey, 8 Beav 602 ...	115, 249, 253, 254
Overton v. Banister, 3 Hare 503 ...	138
Ovey v. Ovey, (1900) 2 Ch 524 ...	75
Owen v. Williams, Amb 734 ...	342
Owens, <i>Re</i> , 47 L T N S 61 ...	76, 186, 215
Owkes v. Pescol, 44 L J Ch 367 ...	331

P

Paddon v. Richardson, 7 De G M and G 563 ...	71, 84, 120, 221, 244
Page v. Cooper, 16 Beav 400 ...	123
—— v. Leapingwell, 18 Ves 463 ...	330
Palaret v. Carew, 32 Beav 564 (568) ...	123, 197, 303, 306, 309
Palk <i>Re</i> Chamberlain v. Drake, 41 W R 23 ...	155
Palmer v. Jones, 1 Vern 144 ...	133
—— v. Simmonds, 2 Drew 221 ...	49
Parfitt v. Lawless, L R 2 P and M 462 ...	347
Parkes v. White, 11 Ves 209 (226) ...	272, 274
Park Gate Wagon Co., <i>Re</i> 17 Ch D (C A) 234 ...	257
Parnell v. Parnell, 9 Ch D 96 ...	47
Parry v. Warrington, 6 Madd 155 ...	125
Parsons v. Baker, 18 Ves 476 ...	46
Partington, <i>Re</i> , Reigh v. Fane, (1902), 1 Ch 711 ...	192
Pass v. Dundas, 29 W R 332 ...	152
Passingham v. Sherborn, 9 Beav 424 ...	312
Paterson v. Murphy, 11 Hare 88 ...	326
—— v. Paterson, L R 3 Eq 111 ...	218
Pathson v. Hawksworth, 10 Beav 375 ...	283
Patman v. Harland, L R 17 Ch D 353 ...	23, 28
Patterden v. Hobson, 1 Eq Rep 28 ...	126
Paul v. Children, 12 L R Eq 16 ...	33
Paulett v. A. G. Hard, 467, 469 ...	69
Pawson v. Brown, 13 Ch D 202 ...	59
Payne v. Barker, S G Bridgm Rep 24 ...	246
—— v. Stangford, 1 Ch 288 ...	309
Pearce v. Gardner, 10 Hare 287 (291) ...	126, 127, 201

	PAGE
Pearce v. Pearce, 22 Beav 248	73, 315, 317
Pearks v. Mosley, 5 App Cas 714 (719)	34, 39
Pearse v. Green, 1 Jac and W 135 (140)	114, 115, 254
Pearson <i>Re</i> , 21 W R 401	176
— v. Belcher, 4 Ves 627	284
— v. Lane, 17 Ves 101	251
Pechel v. Fowler, 2 Ans 550	196
Pockham v. Taylor, 31 Beav 250	42
Peers v. Cooley, 15 Beav 209	164
Peke v. Stephens, 12 Q B 465	31
Pell v. Downton, 2 De G and J 18 (20)	187, 203, 206
Penn v. Lord Baltimore, 1 Ves 444 (446)	63, 66
Pennoll v. Deffoll, 4 D M and G 372 (382)	282, 287, 294
Penny v. Arison, 3 Jur N S 62	144, 147
Pepper v. Tuckey, (1844) 2 Je and Lat 95	303
Peppercorn v. Wayman, 5 De G and Sm 230	222
Perrot v. Perrot, 3 Atk 94	111
Perry v. Philips, 4 Ves 108... ..	294
— v. Shipway, 4 D and J 353	213
Petre v. P, 1 Drew 371	198
Pettingall v. Pettingall, 11 L J Ch 176	46
Phelps, <i>Ex parte</i> , 9 Madd 357	266
—, 31 Ch D 351	310
Phibrick's Trust, <i>Re</i> , 13 W R 570	253
Philips v. Brydges, 3 Ves 120 (127)	17, 148, 257
Phillips, <i>Ex parte</i> , 2 Denc 334	211
Phillipson v. Gatty, 7 Hare 516 (523)	110, 284
Phipps v. Lovergrove, 16 Eq 80	82, 260, 313, 323
Pickard v. Anderson, 13 L R Eq 608	245
Pickering v. Pickering, 4 My and Cr 289	105
Pirson v. Garnett, 2 B C C 38	46, 51
— v. Higgs, 5 Ves 505	263
Pigg v. Clarke, 3 Ch D 672	45
Pink v. De Thusey, 2 Madd 157	110
Pisano v. Attorney-General for Gibraltar L R 5 P C 516	344
Pitcairn, <i>Re</i> , Brandreth v. Colvix, 2 Ch 199	106
Pitt v. Bonner, 1 Y and C C C 670	157
— v. Pelham, Freem 174	262
Pitt's Settlement, <i>Re</i> , W N 1884, p. 225	193
Plaskitt v. Eddis, 79 D T 136 (139)	82, 150
Ple <i>Re</i> , 2 Pr and S 420	345
Plenty v. Wise, 16 Beav 356	316
Plogg v. Johnson, 2 L R Ch App 225	144
Plowrigh v. Lambert, 52 L T 646	272
Pocock v. Reddington, 5 Ves 794	120
Poole v. Poss, 1 Beav 600	166
Pooley v. Ruotter, 4 Drew 189	272
Pope v. Pope, 10 Sim 1	49
Portlok v. Gardner, 1 Hare 606	343
Pothonier De Dent <i>Re</i> , v. De Pothonier, (1900), 2 Ch 529	97, 163
Potter v. Chapman, Amb 98	15

	PAGE
Potts v. Britton, 11 L R Eq 433	120
— v. Potts, 3 L J Ch 176	112
Pouleth v. Hood, 5 L R Eq 115	200
Powell v. Evans, 5 Ves 839...	88
Power v. Glower, 3 P Wms 251	238
Powys v. Blagrave, 4 D M and G 448	89, 101, 111, 113
— v. ———, Kay 495	111
Prance and Gurrard's Trustee v. Hunsing, (1897) 2 Q B 19	298
Prndergast v. Prndergast, 3 H L C 218	108
Price v. Blackmore, 6 Beav 507	294
— v. Byrn, 5 Ves 681	275
— v. Leaden, 21 Beav 508	168
Priddy v. Rose, 3 Mer 86	301
Pride v. Forks, 2 Beav 130	131, 136
Prince v. Burlington, 3 M and G 186	58
— v. Hive, 27 Beav 315	212
Provost of Edinburgh v. Lord Advocate, 4 A C 823	289, 295
Pugh v. Vaughan, 12 Beav 517 (520)	89, 111 113
— v. Waughad, 12 Beav 517	250
Pulnertoft v. Pulnertoft, 18 Ves 99	52
Pulteney v. Darlington, 1 B C C 237	147
Pumprey, <i>Re</i> , 22 Ch D 255	169, 293
Purefoy v. Purefoy, 1 Vern 28	79, 214
Pybus v. Smith, 1 Ves J 193	133
Pye, <i>Ex parte</i> Dubost <i>Ex parte</i> , 18 Ves 110	52

Q

Queen v. Sterry, 12 Ad and Ed 84	8
----------------------------------	---

R

R v. Mitchell, 17 Cox C C 503	144
Raby v. Ridehalgh, 7 D M and G 104 (108, 109)	110, 119, 173, 299
Rackham v. Siddal, 16 Sim 297	134
Randall v. Errington, 10 Ves 123 (427)	275, 276, 283
Ransdon v. Langley, 2 Vern 536	166
Raphael v. Boohur, 11 Ves 92 (97, 111)	146, 147
— v. ———, 13 Ves 407, 590	147
Ratcliffe, 2 Ch 352	263
— v. Barnard, L R 6 Ch 652	23
— v. Graves, 1 Vern 196	145
— v. Winch, 17 Beav 216	218
Rayne v. Baker, 1 Giff 241	290
Reade v. Reade, 5 Ves 744	285
— v. Sparkes, 1 Moll 8...	212
Boycott <i>Re</i> , 5 W R 15	316
Redding, <i>Re</i> , Thompson v. Redding, (1897), 1 Ch 876	191
Reech v. Kennogal, 1 Ves Sm. 123	115
Rehdon v. Wesley, 29 Beav 213	99, 159
Remnant v. Hood, 2 De G F and J 404	144
Reynel v. Sprye, 1 De G and M and G 660	338
Reynolds, <i>Ex parte</i> , 5 Ves 707	144, 266, 267

	PAGE
Reyton, <i>Re</i> , 30 Beav 252	201
Rhodes v. Bate, 1 Ch 252	146
Rice v. Rice, 2 Drud 73	18, 352
— v. — 2 Drow, 84	214, 325
Richards v. Delbridge, L R 18 Eq 11 (11) ..	45, 53, 54
Richardson v. Young, L R 6 Ch App 478 ..	232
Rickard, <i>Re</i> , Rickard v. Robson, 31 Beav 214 ...	39
Ridgway v. Newstead, 3 D F and J 471 ...	130
Rigbys Trust, <i>Re</i> , 15 W R 190	33
Roberts v. (Gordon, 6 C D 531 (534) ..	71, 220, 221
— R v. R, 1905, 1 Ch 704	217
— v. Tunstall, 4 Ha 257	276
Robertson v. Armstrong, 28 Beav 123	134
Robinson v. Harkin, 1896, 2 Chy 415	152, 155, 157, 228
— v. Litton, 3 Atk 485	111
— v. Pett, 3 P Wms	239
— v. —, 2 W and T 606	68, 167, 235
— v. R, 1 D M and G 247 (256)	136, 144
Robson v. Flight, 4 De G J and S 608 (614) ...	51, 228
Roche, <i>Re</i> , 2 D and War 287	310
— v. O'Brien, 1 B and B 330 (353)	279
Rochefoucauld v. Boustead, 1 Ch (C A) 196 ...	143, 340
Roe v. Nix, (1893) P 55	58
Rogers, <i>Re</i> , 3 P W 193	335
—, 26 Ch D (C A) 31	161
Rolland v. Hart, L R 6 Ch 678	31
Rollie v. Budder, Bunb 187	51
Roots v. Williamson, 38 C D 185	290
Roper-Curzon v. Roper-Curzon, 11 Eq 452 ...	193
Ross, <i>Re</i> , (1900) 1 Ch 162	187
Roth Goldberger <i>Re</i> , v. Roth, 74 L J 51	211
Routh v. Howell, 3 Ves 565	98
Rox v. Londale, 1 Burd 448	316
Rowe v. Rowe, 24 Beav 276	105
Rowland v. Morgan, 13 Jur 23	177
Rowley v. Adams, 2 H L C 725	87, 89
— v. (Innevor, 2 Ch 503	312
Rowells v. Bibb, 1900, 2 Ch 107 (C A)... ..	108
Russel, <i>Ex parte</i> , L R 19 Ch D 588	167
Rustomjee v. Queen, 2 Q B D (C A) 69	66
Ryall v. Ryall, 1 Atk 59	286
— v. Roll, 1 Atk 168	287
Ryder v. Bickerton, 3 Sw 80 (N)	118
Ryder v. Stanfield, (1895), 1 Ch 19	10

S

Saffron Walden, Second, Benefit Building Society v. Rayner, 14 Ch D (C A) 406	260
Sale v. Moore, 1 Sim 534	46, 47, 49, 50
Salisbury v. Bagot, 2 Swanst 608	262
Saltmarsh v. Barrett, 31 Beav 349	144

	PAGE
Sulway v. Salway, 2 R and M 218	152
— v. —, 4 Russ 60	98
Sanders v. Dehew, 2 Vern 271	290
— v. Miller, 25 Beav 154	192
Sanderson v. Walker, 13 Ves 601	273
Sandon v. Hooper, 6 Beav 246	167
Sandys v. Watson, 2 Atk 80	115
Saragosa, The etc, Co v. Collingham (1904) A C 159	217
Saunders v. Vantier, 4 Beav 115	249
Saunders v. Neville, 2 Vern 428	248
— v. Vantier, 4 Beav 115	11
Sawyer v. Goodwin, 36 L J N S Ch 578	147
Scot v. Tyler, 2 Dick 725	42
Scott, <i>Re</i> , 8 Ir Ch Rep 316	138
— v. Bechor, 4 Price 346	267, 269
— v. Milne, 25 Ch D (C A) 710	169, 171, 190, 250
— v. Tylor, 2 Dick 712 (725)	209
Scounden v. Hawley, Comp 172	66
Scudamore v. Scudamore, Pr Ch 543	148
Sculthorpe v. Tipper, L R 13 Eq 232	131, 136
Scnfield v. Howes, 3 B C C 90	130
Seagram v. Knight, 2 Ch A 630	184
Sealy v. Stawell, 2 Ir R Eq... ..	294
Seely v. Jago, 1 P W 389	148
Seisson v. Shaw, 9 Ves 284	193
Selby v. Alston, 3 Ves 341	148
— v. Bowie, 4 Giff 300	123, 197
Sellack v. Harris, 5 Vin A C 521	42
Scalhorpe v. Tupper, 13 L R Eq 232	132
Sewell v. Denning, 10 Beav 315	328
— v. Musson, 1 Vern 210	80
Sewell's Estate, <i>In re</i> , L R 11 Eq 80	104, 106
Shafto's Trusts, <i>Re</i> , 29 Ch D 247	314
Shakeshaft, <i>Ex parte</i> , 2 B C C 197	135
Sharp v. Lush, 10 Ch D 468	172
— v. Sharp, 2 B and A 405	70, 219
Sharpe v. Jackson, (1899) A C 419	288
— v. San Paulo Railway Co., 8 L R Ch 597, 609	268
Shaw v. Lawless, 1 Le and G 154	169
Shaw's Trust <i>Re</i> , L R 12 Eq 124	102
Shearman v. Robinson, 15 Ch D 548	171
Shee v. Hale, 13 Ves 404	38
Sheldon v. Cox, (four 2nd Ed p 224	20
— Nixon v. Sheldon, 39 C D 50	106
Shelwerdine, 33 L J Ch 474	319, 320
Sheppard, <i>Re</i> , W N (1888) 234	310
Sheridan v. Joyee, 7 Ir Eq Rep 115	77
Sherwood, <i>Re</i> , 3 Beav 338	235
Shewen v. Vanderporst, 2 R and M 75... ..	224
Siekstone and Haeigh Moore Coal Co v. Edey, (1900) 1 Ch 167	273
Siggers v. Evans, 5 Ell and Bl 367	214, 325

	PAGE
Silkstone and Haigh Moor Coal Co. v. Edey, (1900) 1 Ch 167	285
Simes v. Eyre, 6 Hare 187	85
Sinnot v. Walsh, 3 L R Ir 12	16
Sir G. Colebrook's Case, 6 Ves 622	279
Sisson's Settlement, <i>Re</i> , (1903) 1 Ch 262	97, 163
Sloight v. Lawson, 3 K and J 292	133
Small v. Marwood, 9 B and C 299 (307)	69, 223
Smedley v. Varley, 23 Beav 358	273
Smotherst v. Hastings, 30 Ch D 490	122
Smith, <i>In re</i> , 1 Ch 171	132
Smith <i>Ex parte</i> , 1 Deac 385 (391)	211, 232
— v. Anderson, L R 15 Ch Div 247 (1880)	73
— v. Cooke, 1891 A C 297	335
— v. Dale, L R 18 Ch D 516 (518)	233
— v. Dresser, L R 1 Eq 651	167
— v. French, 2 Atk 243	139
— v. Hayes, Ir R 1 C L 333	143
— v. Pavier, Wood, V.C., 18th July 1852	161
— v. Smith, 2 C and M 233	260
— v. Thompson, (1896) 1 Ch 71	185
— v. Wheeler, 1 Mod 17	245
— v. —, 1 Vent 128 (130)	209, 222
— v. Willis, Tay 159	254
Snowdon v. Dales, 6 Sim 524	37, 257
Soar v. Ashwell, (1893) 2 Q B 390 (397)	282
Somerset, <i>Re</i> , (1894) 1 Ch (C A) 231	174
—, W N (1887) 122	305, 319
Sonley v. Clockmaker's Company, 1 B C C 81	262
Sottomayor v. De Barros, L R 8 P D 1	57
Speight v. Gaunt, 9 App Ca 1	95, 231
Speller, <i>Re</i> , 6 Jur N S 386...	176
Spencer v. Tophan, 22 Beav 573	344
Spender v. Tapham, 22 Beav 573	243
Spottiswoode v. Stockdale, 4 Coop 102	80
Spring v. Dashwood, 2 Giff 521	254
Springett v. Dashwood, 2 Giff 521	115
Stacey v. Elph, 1 M and K 195 (199)	70, 241
Stackhouse v. Barnston, 10 Ves 466	142
Stafford v. Fiddon, 23 Beav 386	144
Stanford v. Roberts, 6 L R Ch App 307	160
Stanier v. Evans, 34 Ch D 470	169
Stanley v. Stanley, 7 Ch D 589	252
Starkey v. Brookes, 1 P Wms 390	329, 334
Stead v. Newdigate 2 Mer 521	148
Steel v. Mellar, 5 Ch D 2225	329
Steen v. Peebles, 25 L R Ir 544	189
Stevens v. Austen, 7 Jur N S 873	196
— v. Robertson, 37 L J Ch 499	78, 204
Stewart v. Green, 5 L R Eq 470	14
Stickland v. Aldridge, 9 Ves 519	43
Stickney v. Sewell, 1 M and Cr 8 (14)	99, 120, 121, 245

					PAGE
Stocey v. Elph, 1 M and K 199	...	...	...	...	219
Stocken v. Dawes, 6 Beav 371	...	...	...	...	237
——— Jones, <i>Re</i> , v. Hawkins, 38 Ch D 319	...	...	...	...	226
Stokes, <i>Re</i> , 13 Eq 333	...	...	...	...	305
——— v. Cheek, 29 Beav 620	...	...	...	...	187
——— v. Prance, 1 Ch 212...	...	...	...	...	90
Stoke's Trusts, <i>Re</i> , 13 Eq 333	...	...	...	...	316, 317
Stone v. Godfrey, 5 D M G 76	...	...	...	...	91, 92
——— v. Stone, L R 5 Ch Ap 74	...	...	...	...	89, 282, 287
Stones v. Rowton, 17 Beav 308	...	...	...	...	315
Storey v. Cooke, (1891) A C 297	...	...	...	...	80
Story v. Windsor, 2 Atk 630	...	...	...	...	290
Stott v. Milne, 25 Ch D (C A) 710	...	...	...	...	83
Strainer, v. Hodgkinson, 52 W R 260	...	...	...	...	105
Strange v. Focks, 4 Giff 408	...	...	...	...	143
Stratton v. Murphy, 1 Ir Rep Eq 361	...	...	...	...	277
Strickland v. Symons, 26 Ch D (C A) 218	...	...	...	...	170
Stright, <i>Ex parte</i> , Mont 502	...	...	...	...	261
Stronghull v. Anstey, 1 De M G 635 (645, 648)	...	...	...	...	123, 126, 209
Stroud v. Gwyer, 28 Beav 130	...	...	...	...	239, 296
Stuart v. Norton, 14 M P C 17	...	...	...	...	230
——— v. Stuart, 3 Beav 430	...	...	...	...	110
Stubbin's <i>Ex parte</i> , L R 17 Ch D 58	...	...	...	...	288
Stuckland v. Symons, L R 22 Ch D 666	...	...	...	...	170
Stylas v. Guy, 1 Mac and G 422 (423, 427, 431)	...	...	...	...	70, 119, 120, 139, 284
——— v. —, 16 Sim 230	...	...	...	...	88
Suboodra Beebee v. Bikromadit Singh, 11 S D A 543	...	...	...	...	73, 91
Sugden v. Crossland, 3 Sm and Giff 192	...	...	...	...	239, 309
Sutherland v. Cook, 1 Coll 498 (502)	...	...	...	...	102, 107
Sutton v. Jones, 15 Ves 584	...	...	...	...	241
——— v. —, Dick 587	...	...	...	...	237
——— v. Wilders, L R 12 Eq 373	...	...	...	...	230
——— Colefield Case, Id 68	...	...	...	...	291
Swaffield v. Nelson, W N (1876) 255	...	...	...	...	121
Swale v. Swale, 22 Beav 584	...	...	...	...	211
Swan v. Blair, 3 Cl and Fin 610 (621)	...	...	...	...	9
——— v. North British Australian Co, 32 L J Ex 277	...	...	...	...	24
Swinnock v. Crisp, Freem 78	...	...	...	...	193
Syed Khodabunda Khan v. M. S. Oomutal Fatima, 13 S D A 235	...	...	...	...	130
Symes v. Hughes, 9 Eq 475	...	...	...	...	39, 396, 397, 398

T

Tabor v. Brooks, 10 Ch D 273	...	...	...	...	65, 106, 120, 188
Talbot v. Earl of Radnor, 3 M and K 252	...	...	...	...	179
——— v. Marshfield, 2 Dr and Sm 285...	...	...	...	...	194
——— v. O. Sullivan, 6 L R Ir 302	...	...	...	...	51
Talbott v. Scott, 4 K and J 139	...	...	...	...	270
Talner v. Fowler, 1 Ch C 269	...	...	...	...	28
Tanner v. Elworthy, 4 Beav 487	...	...	...	...	349
Tanqueray-Willame and Landan, <i>Re</i> , 20 Ch D 465	...	...	...	...	209
Tarman's Estate, <i>Re</i> , L R 8 Ch D 584...	...	...	...	...	330

	PAGE
Tate v. Williamson, 2 Ch A 55	243
Taylor, <i>Ex parte</i> , L R 18 Q B D 295	288
— v. Cartwright, 14 L R Eq 175 (176)	141, 143
— v. Clark, 1 Ha 161	107
— v. Havgarth, 14 Sim 16	92
— v. London and County Banking Co, (1901) 2 Ch 231	288
— v. Millington, 4 Jur (N S) 204... ..	83, 88
— v. Plumer, 3 M and S 562 (575, 582)	282, 285
— v. Sparrow, 4 Giff 703	161, 255
— v. Tabrum, 6 Sim 281	201, 202
Tebbit v. Tebbit, 1 De G and Sm 506	314
Tebbs v. Carpenter, 1 Madd 290 (298)	86, 101, 145, 277
Teissures Settled Estates, <i>In re</i> De, (1893) 1 Ch 153 (165)	176
Tempest, <i>In re</i> , L R 1 Ch App 485 (491)	317, 320, 321
— v. Lord Camoys, 21 Ch D 571	188, 191, 216
— v. ———, 58 L T N S 221	312
Tennant v. Trenchard, L R Ch App 537 (547)	239, 242, 272
Tepest, <i>Re</i> , Ch A 485	265
— v. Lord Camoys, 21 Ch D 576... ..	188
Tevon v. Bush, 1 Vern 342	218
Thomas, <i>In re</i> , 3 Ch 482	132
— v. Dering, 1 Kee 729	111, 194, 233
— v. Townsend, 16 Jur 736	195
Thompson v. Blackstone, 6 Beav 470	127
— v. Dunn, L R 5 Ch 573	114
— v. Eastwood, L R 2 Ap Ca 215	112
— v. Finch, 22 Beav 316 (325)	141, 154, 156
Thomson v. Clydesdale Bank, (1893) A C 282	281
— v. Eastwood, 2 A C 215 (216, 236)	142, 283
— v. Harrison, 2 Bro CC 164	142
Thorley, <i>Re</i> , 2 Ch 613	84
Thorndike v. Hunt, 3 D and J 563	289
Thorne v. Heard, (1894) 1 Ch 599 (605)	283
Thorniley v. Aspland, 2 C B 160	38
Thornton v. Ellis, 15 Beav 193	106
— v. Home, 31 Beav 14	34
Thurston v. Dickenson, 2 Rich Eq 317	191
Tickner v. Old, L R 18 Eq 422	173
Tidd v. Lister, 5 Madd 429... ..	247
Tillett, <i>In re</i> , Lee v. Wilson, 1 Ch 88	116
Tipping v. Eekersley, 2 K and J 264	112
Todd v. Moorhouse, L R 19 Eq 69	168
Tollemache, <i>Re</i> , 1 Ch 955	78
Tollmache, <i>Re</i> 1 Ch 457	107
Tombin v. Luce, 43 Ch D (C A) 191	342
Tomlin v. — 41 Ch D 573	123, 197
Tomsen v. Judge, 3 Drew 306	344
Tooker v. Annesley, 5 Sim 235	127
Tourville v. Naish, 3 P W 306	19, 290
Towers v. African Jug Co., (1904) 1 Ch 558	173
Town v. Sherborne, Birrell 109	151

	PAGE
Townby v. Sherborne, 2 W and T 629 ...	233
Townend v. Townend, 1 Giff 201 ...	147
Townley v. Sherborne, Bridgman 35 ...	149, 151, 212
Townson v. Tickell, 3 B and A 31 ...	69, 220
Trafford v. Bochun, 3 Atk 440 (444) ...	138, 173
Travis v. Ilingworth, 34 L J Ch 665 ...	310
— v. — W N 1868, p 206 ...	164
Trench v. Harrison, 17 Sim 111 ...	294
Trever v. Hutchins, (1896) 1 Ch (C A) 844 ...	185
Trinidad Asphalt Co. v. Coryat, (1896) A C 587 ...	18
Trutch v. Lampiell, 20 Beav 116 ...	152
Tryon, <i>Re</i> , 7 Beav 496 ...	72
Tudball v. Medlicott, 36 W R 886 ...	85
Turner, <i>Re</i> , (1897) 1 Ch 536 ...	75
— v. Buck, 18 L R Eq 361 ...	125
— v. Courtney, 5 Beav 517 ...	228
— v. Hancock, 20 C D 303 ...	278
— v. Harvey, Jac 169 ...	127
— v. Newport, 2 Ph 14 ...	108
— v. T, 1 J and W 43 ...	145
Turpin, <i>Ex parte</i> , 1 D and C 120 ...	299
Twyne's Case, 3 Rep 80 (<i>n</i>) ...	43
Tyler, <i>In re</i> , (1831) 3 Ch 252 ...	9
Tyrol v. Bank of London, 10 H L 26 ...	343
Tyron, <i>Re</i> , 7 Beav 496 ...	222

U

Underwood v. Stevens, 1 Mer M 717 ..	139
Unmacke, <i>Re</i> , 1 J and Lat 1 ...	69, 70, 71, 222
Union Bank of Australia v. Murray Aynsley, (1899) A C 693 ...	281
Urch v. Walker, 3 M and C 702 ...	69, 70

V

Van Straubenzee, <i>Re</i> , Boustend v. Cooper, (1901) 2 Ch 779 ...	103
Vaughan, <i>In re</i> , 33 Ch D 187 ...	9, 39
Vaughton v. Noble, 30 Beav 34 ...	239
Verney v. Carding, 18 Ch and Lef 345 ...	287
Vethu v. Ramji, (1875), B P J 297 ...	27
Vicar of St Botolph Aldgate, (1891) 3 Ch 544 ...	177
Vicery v. Evans, 36 Beav 376 ...	120
Vickery v. Evans, 33 Beav 376 ...	100
Vigrass v. Binfield, 3 Mad 62 ...	118
Vincent v. Newcombe, Younge 599 ...	105
Vino v. Raleigh, (1891) 2 Ch 13 ...	37
Viner v. Vaughan, 2 Beav 469 ...	111
Viscountess D'Adhemar v. Bertrand, 35 Beav 19 ...	308
Vyse v. Porter, L R 7 H L 318 ...	147, 190, 296
— v. Foster, 8 Ch App 309 (331, 340) ...	145, 146, 149, 190, 299, 294

W

Waite v. Littlewood, 41 L J Ch 626 ...	203
Waivewright v. Elwell, 1 Madd 634 ...	16

	PAGE
Wakeman v. Duchess of Rodland, 3 Ves 237 ...	198
Waldo v. Carly, 16 Ves 206...	234
—— v. Waldo, 7 Sim 261 ...	86, 189
Walker, <i>Re</i> , (1901) 1 Ch 879 ...	193
—— and Oakshott's Contract. <i>Re</i> , (1901) 2 Ch 383 ...	198
—— v. Duncombe, 1 Ch 879 ...	78, 165
—— v. Shore, 19 Ves M 391 ...	126, 202
—— v. Smalwood, Amb 676 ...	127, 195, 224
—— v. Symonds, 3 Swanst 1 (58, 63, 64, 71, 80, 82) ...	85, 114, 115, 130, 138, 139, 232, 279, 300
—— v. Wetherell, 6 Ves 473 (477) ...	193
Wall v. Rogers, 9 Eq 58 ...	216
Wallay v. Wallay, 1 Vern 484 ...	353
Walter v. Maunde, 19 Ves 429 ...	248
Walters v. Woodbridge, L R 7 Ch D 504 ...	166, 212
Walwyn v. Coutts, 3 Sim 14 ...	214
Warbuston v. Sandys, 14 Sim 622 ...	223, 311, 312, 317, 323
Ward v. Hipwell, 3 Giff 547 ...	214
—— v. Turner, 1 Wh and T L C 1013 ...	42
—— v. Ward, 2 H L C 784 ...	98, 183, 190
Ware v. Lord Egmont, 4 De G M & G 460 (473) ...	21
Waring v. Waring, 3 Ir Ch Rep 331 ...	119
Warner v. Jacob, 20 Ch D 220 ...	342
Warrek v. Warrek, 3 Atk 294 ...	18
Warren, <i>Re</i> , 51 L G N S 561 ...	218
Warriner v. Rogers, L R 16 Eq 340 ...	53
Warter v. Anderson, 11 Hare 301 ...	166, 313
Wasdale, <i>In re</i> , (1899) 1 Ch 163 ...	260
Waters v. Thorn, 22 Beav 547 ...	279
Watkins, <i>Ex parte</i> , 1 Men and Ayr 689 ...	261
—— v. Cheek, 2 S and S 199 (205) ...	42, 208
Watson v. Pearson, 2 Ex 581 ...	223
—— v. Row, 18 L R Eq 680 ...	165
—— v. Toone, 6 Madd 153 ...	279, 275, 277
Watts, <i>Re</i> , 9 Ha 106 ...	310
—— v. Cresswell, 9 Win 415 ...	67
—— v. Turner, 1 K and M G 34 ...	250
Weall, <i>In re</i> , 42 Ch D 674 ...	79
Weaver, <i>Re</i> , 21 Ch D 615 ...	188
Webb v. Earl of Shaftesbury, 7 Ves 480 (487, 488) ...	166, 235, 269, 312
—— v. Headgum, 1 K and J 385 ...	206
—— v. Jones, 39 Ch D 660 ...	99
—— v. Shaftesbury, 7 Ves 480 ...	197
—— v. Webb, 1 Eden 8 ...	161
—— v. ———, 16 Sim 55 ...	212
Wedderburn v. Wedderburn, 22 Beav 84 ...	237, 282
Wedgewood v. Adams, 6 Beav 600 ...	90, 200
Weeden v. Warren, 51 L J 561 ...	216
Wellesley v. Morrinton, W R 1870, p 192 ...	177
—— v. Withers, 4 E and B 750 ...	70
Wellis v. Wellis, 2 Atk 71 ...	331

	PAGE
Wellis, <i>Re</i> , Boyer v. Maclean, (1903) 1 Ch 379	78
Welstead v. Colvile, 28 Beav 537	75, 311
Welton v. Hill, 25 L J Ch 152	216
West v. Reed, 2 Hare 257 (259)	24
— v. Shuttleworth, 2 My and K 684	36
Westneath v. Westmeath, 1 Dow (N S) 519	36
Westmoreland v. Holland, 19 W R 302	86
Weston, <i>Re</i> , (1900) 2 Ch 164	299
Westover v. Chapman, 1 Coll 177	245
Wetherell v. Wilson, 1 Keen 86	250
Weymouth v. Boyer, 1 Ves J 425	19
Wheeler and Richard, <i>Re</i> , (1876) 1 Ch 315	310
Wheldale v. Partridge 5 Ves 396	148
Whitchote v. Lawrence, 1 Ves 740 (750)	241, 271, 275
Whicker v. Hume, 7 H J, Cases 124	8
Whilcote v. Lawronce, 3 Ves 752	284
Whillet v. Blanford, 1 Hare 235	297
Whistler v. Newman, 4 Ves 129	139
Whitaker v. Rush, Ant 407...	259
Whitby v. Mitchell, 42 Ch D 494	35
Whitcomb v. Minchin, 5 Mad 91	241
White v. Barton, 18 Beav 192	69
— v. Baylor, 10 Ir R Eq 53	262
— v. Foljambe, 11 Ves 337 (340, 345)	200
— v. Jackson, 15 Beav 191	114
— v. McDermott, 1 R 7 C L 1	70, 219
— v. White, (1893) 2 Ch 41	10
Whitechurch v. Cavanaugh, (1902) A C 117	29
Whitefield v. Bourt, 2 P Wms 240	349
Whiteley v. Learoyd, 12 A C 727	230
— v. —, 33 Ch D 355	94
Whiteney v. Smith, 4 Ch App 513	218
White's Trusts, <i>In re</i> , (1886) 33 Ch D 449 (453)	10
Whitmore v. Turquand, 1 J and H 444	214
Whittaker v. Kershaw, 45 Ch D 320	171
Whitton v. Loyd, 1 Ch Ca 275	218
Widdowson v. Duck, 3 Mar 494	226
Wigg v. Wigg, 1 Ath 382 (384)	19, 290
Wightwick v. Lord, 6 L C 217	106
Wilcock, <i>Re</i> , 34 Ch D 508	315
Wilde v. Banning, L R 2 Eq 577	80
— v. Gibson, 1 H L C 605	21
Wildgoose v. Weyland, Gould 147	18
Wilding v. Bolder, 21 Beav 222	312, 321
— v. Richards, 1 Coll 655 (661)	325, 327
Wiles v. Cooper, 9 Beav 298	212
— v. Gresham, 2 Drew 258 (268, 271)	101, 121, 180, 149
— v. —, 5 D M G 770	213
Wilke's Charity, <i>Re</i> , 3 Mac and G 440 (448)	110, 234
Wilkes v. Steward, G Coop 6	120, 244
Wilkins v. Fry, 2 Rose 375...	200

	PAGE
Wilkins v. Hogg, 3 Giff 116	151
Wilkinson v. Adam, 1 V and B. 472	33
— v. Bewick, 4 Jur N. S 1010	99
— v. Duncan, 23 Beav 469	126
— v. Malin, 2 Tyr 544	232
— v. Parry, 4 Russ 272 (276)	139, 300, 304, 315
— v. Wilkinson, 2 S and S 237	166
Wilks v. Groom, 3 Drew 584	98, 100
Willes v. Greenhill, 29 Beav 387	30
Willet v. Blanford, 1 Hare 253	297
Williams, <i>Re</i> , 36 Ch D 231... ..	319
—, <i>In re</i> , (1897) 2 Ch (C A) 12 (19)	13, 50
— v. Allen, 32 Beav 650	299
— v. Baley, L R 1 H L 200	318
— v. Coade, 10 Ves 500	334
— v. Corbet, 8 Sim 349	169
— v. Dixon, 3 Beav 472	152
— v. Scott, (1900) A C 499 (503)	243, 271
— v. Stevens, 36 L J P C 21	341
— v. Wight, (1890) W N 50	212
— v. Williams, 17 Ch D 437	261
Williamson v. Barber, 9 Ch D 529	180
Willis v. Earl Howe, (1893) 2 Ch (C A) 545	283
— v. Willis, 2 Atk 71	332
Willmott v. Barber, 15 Ch D 96	140
Wills, <i>Re</i> , Wills v. Wills (1902), 1 Ch 15	192
Wills, <i>Re</i> , L R 25 Q B D	235
Wilson v. Day, 2 Burr 827	43
— v. Heaton, 11 Beav 492	172
— v. Mayor, 11 Ves 205	334
— v. Moore, 1 M and K 127	155
Winch v. Button, 14 Sim 379	47
Winter v. Rudge, 15 Sim 596	318
Wise v. Perpetual Trustee Company, (1903) A C 139	171
— v. Piper, 13 Ch D 848	253
— v. Wive, 2 J and Lat 403	69, 222
Wise's Trust, <i>Re</i> , 3 Ir R Eq 599	311
Withington v. Withington, 16 Sim 104	310
Woles Stoncroft v. Long, 1 Ch Ca 32	218
Wood v. Cox, 5 M and Cr 684	51
— v. Downes, 18 Ves 120 (128)	279
— v. Patteson, 10 Beav 541 (544)	185, 189
— v. Richardson, 4 Beav 176	124, 198
Wood v. Stone, 8 Price 613	266, 267
Woodgate, <i>Re</i> , 5 W R 448	319
Woodhead v. Marriott, C P Coop Cases, 1837-38, 62	144
Woodhouse v. Meredith, 1 J and W 204	124
— v. Woodhouse, 8 Eq 514	101
Woods v. Axton, W R 1866, p. 207	167
Woods, <i>Re</i> , Gabellini v. Woods, (1904) 2 Ch 4	108
Woodvatt v. Gresley, 8 Sim 180	298, 299

					PAGE
Woolf v. W. (1899) 1 Ch 343	...	...	...	...	138
Worrall v. Harford, 8 Ves 8	...	...	...	...	159, 164
Worsam, <i>Re</i> , 51 L J Ch 660	...	...	...	...	274
Worthington v. M'Crazor, 28 Beav 81	...	...	...	...	193
Wren v. Kirton, 11 Ves 377	...	...	...	...	98
Wright v. Robotham, 33 C D 108	...	...	...	...	256
—— v. Snowe, 3 De G and Sm 321	...	...	...	...	138
—— v. Vanderplank, 2 K and J 1	...	...	...	...	344
—— v. Wright, 1 Ves 411	...	...	...	...	61
Wrights' Trust, <i>Re</i> , 3 K and J 421	...	...	...	...	181
—— <i>Re</i> , (1901) 1 Ch 317	...	...	...	...	216
Wylly's Trust, <i>Re</i> , 28 Beav 458	...	...	...	...	176, 177
Wyman v. Carter, 12 Eq 309	...	...	...	...	221
Wynne v. Humbeston, 27 Beav 421	...	...	...	...	161, 253, 254
Wyther, <i>Re</i> , (1893) 2 Ch 369	...	...	...	...	255
Y					
Yeatman v. Yeatman, 7 Ch D 210	...	...	...	...	268
Yorks Building Co. v. Mackenzie, 8 B P C 42	...	...	...	...	277, 278
York Co. v. Hudson, 13 Beav 485	...	...	...	...	343
Youde v. Cloud, 18 Eq 634	...	...	...	...	82, 83
Young v. Martin, 2 Y and C C C 582	...	...	...	...	49
—— v. Peachy, 2 Atk 154	...	...	...	...	330
Z					
Zambaco v. Casavetti, 11 L R Eq 439	...	...	...	...	141, 323

